**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

| | | |
|---|---|---|
| In the Matter of Global NAPs Petition for Declaratory Ruling and for Preemption of the Pennsylvania, New Hampshire and Maryland State Commissions | ) ) ) ) ) | WC Docket No. 10-60 |

# INITIAL COMMENTS OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Joseph K. Witmer
Assistant Counsel
Attorney ID No. 74939

Kathryn Sophy
Deputy Chief Counsel

Bohdan R. Pankiw
Chief Counsel
Pennsylvania Public Utility Commission

P.O. Box 3263
Harrisburg, PA 17105-3265
(717) 787-5000

April 2, 2010

## Table of Contents

| | | Page |
|---|---|---|
| **Introduction** | | 3 |
| **Comments** | | 4 |
| I. | GNAPs' Reliance on the FCC's *Vonage* Decision Is Misplaced | 4 |
| II. | Both the FCC and the States Exercise Jurisdiction On Intercarrier Compensation Matters Involving the Transport and Termination of Interexchange Traffic | 6 |
| III. | The FCC's *Time Warner* Decision Does Not Mandate A Single Type of Intercarrier Compensation Nor Does It Absolve GNAPs from Jurisdictional Intercarrier Compensation Responsibilities for Interexchange Traffic Termination | 12 |
| IV. | The Current System of Jurisdictional Intercarrier Compensation for Interexchange Traffic Is Lawful, Technically Valid, and Technology Neutral | 15 |
| V. | Granting GNAPs' Requests for Relief Will Create Unwarranted Anti-Competitive Results in Violation of Applicable Federal and State Laws | 22 |
| VI. | Federal Preemption Is Not Warranted | 23 |
| **Conclusion** | | 27 |
| **Appendix A** | | 28 |

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

| | | |
|---|---|---|
| In the Matter of Global NAPs Petition for Declaratory Ruling and for Preemption of the Pennsylvania, New Hampshire and Maryland State Commissions | ) ) ) ) ) | WC Docket No. 10-60 |

**COMMENTS OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

The Pennsylvania Public Utility Commission (Pa. PUC) hereby submits these Comments in response to the Federal Communications Commission (FCC) Public Notice DA 10-461 that was released on March 18, 2010. The FCC has established the deadlines of April 2 and April 12, 2010 for the respective submission of Comments and Reply Comments in this proceeding.

The Pa. PUC appreciates the opportunity to file Comments on the Global NAPs Petition (GNAPs Petition) that is currently pending before the FCC. On March 30, 2010 GNAPs filed a Petition for Reconsideration of the Pa. PUC decision adopted February 11, 2010 and formally entered on March 16, 2010. GNAPs references factual developments occurring on or after February 12, 2010. The PaPUC position taken in these Comments reflects the record and facts as of February 11, 2010 independent of subsequent developments. The Pa. PUC will consider GNAPs Reconsideration Petition in due course and will apprise the FCC accordingly.

GNAPs asserts in it Petition that "[c]onnecting carriers of VoIP [Voice over the Internet Protocol] are immune from access charge liability."[1] This position is clearly unsustainable both on the basis of applicable federal and Pennsylvania law, and on the basis of the extensive factual evidentiary record that was produced in the relevant case adjudication involving GNAPs before the Pa. PUC. The same position also lacks adequate foundation in terms of sound regulatory and

[1] GNAPs Petition at 20.

public policy, and holds the potential of generating unwarranted anti-competitive results and perverse capital investment disincentives.

The present Comments extensively rely on the relevant Pa. PUC Order that conclusively rejected GNAPs positions on the basis of applicable law and fact.[2] The formally entered Pa. PUC Order is hereby attached as Appendix A, and is made part of the Pa. PUC's Comments in this proceeding.

## I. GNAPs' Reliance on the FCC's *Vonage* Decision Is Misplaced

GNAPs' reliance on the FCC's *Vonage* holding is clearly misplaced.[3] The FCC *Vonage* decision primarily addressed issues of state regulation for market entry and the retail services that are rendered to end-users by nomadic VoIP service providers. However, the FCC *Vonage* decision does not address the subject matter on which GNAPs seeks relief in this proceeding. The issue at hand is interstate and intrastate intercarrier compensation for GNAPs' wholesale transport and indirect termination of traffic that includes but is not limited to interexchange calls that have been initiated as nomadic VoIP calls. This GNAPs function of wholesale transport and termination of traffic at the facilities of other telecommunications common carriers is squarely a telecommunications service that is performed by a telecommunications common carrier, and is subject to the appropriate, already existing, and well practiced regime of interstate and intrastate intercarrier compensation for interexchange calls. After an exhaustive analysis of relevant federal and state legal authority on this matter, the Pa. PUC concluded the following in its own formal complaint case adjudication involving GNAPs:

> The overwhelming weight of legal authority of Pennsylvania and federal law, as well as the relevant decisions of other state utility regulatory commissions and courts of appropriate jurisdictions that have dealt with a large number of intercarrier compensation disputes involving GNAPs, leads to the inescapable

---

[2] *Palmerton Telephone Company v. Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and Other Affiliates*, Pa. PUC Docket No. C-2009-2093336, Order entered March 16, 2010 (Pa. PUC Order or Appendix A).

[3] *In re Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211 (FCC Rel. November 12, 2004), Memorandum Opinion and Order, FCC 04-267, 19 FCC Rcd. 22,404 (2004) (FCC *Vonage* decision), *aff'd*, *Minnesota Pub. Util. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007). *See also* GNAPs Petition at 1, 8 10-11, 14, 16, 17-18, 27-28.

conclusion that the FCC *Vonage* decision is not relevant or material on matters pertaining to the intercarrier compensation dispute before us. We believe that the NH PUC [New Hampshire Public Utilities Commission] Order – and other similar decisions – that the FCC *Vonage* decision primarily affects the potential state role on market entry and regulation of nomadic VoIP service providers – is correct. NH PUC Order at 17-19. Here, as in many other jurisdictions, we are not dealing with the issue of market entry and regulation of nomadic VoIP service providers. Instead, we are dealing with the issue of GNAPs, a telecommunications utility carrier, which transports and terminates traffic at Palmerton's PSTN facilities. As in the case of the TDS ILECs [incumbent local exchange carriers] in New Hampshire, Palmerton indirectly receives and terminates traffic that has been transported by GNAPs via the Verizon PA [Verizon Pennsylvania Inc.] tandem switch on Market Street, Philadelphia, Pa. Tr. 667-668, GNAPs Exh. 6.

The FCC *Vonage* decision plainly does not, nor was it intended to, address the issue of whether intercarrier compensation applies for the use of Palmerton's PSTN [public switched telephone network] facilities when terminating VoIP calls. Costs indeed attach to the termination of *any type of traffic* that Palmerton receives, and such costs do not "magically disappear" when the traffic includes VoIP calls whether those are of the nomadic or fixed type. Under the existing and so far unaltered premises of both Pennsylvania and federal law, the Commission determines that Palmerton is entitled to compensation for the traffic that it terminates at its facilities.

Furthermore, indirect transmission of such traffic by GNAPs to Palmerton constitutes a common carrier telecommunications service that falls squarely within this Commission's jurisdiction under applicable Pennsylvania and federal law. Pennsylvania's Voice-Over-Internet Protocol Freedom Act, P.L. 627 of 2008, codified at 73 P.S. § 2251.1 *et seq.*, established the Commission's jurisdictional boundaries over VoIP or IP-enabled services. 73 P.S. § 2251.4. The Act clearly provides that the Commission retains jurisdiction over "[s]witched network access rates or other intercarrier compensation rates for interexchange services provided by a local exchange telecommunications company." 73 P.S. § 2251.6(1)(iv). And it is the question of "switched network access" that is at issue here for the Palmerton PSTN facilities and the GNAPs traffic that these facilities terminate. *See also* 66 Pa. C.S. § 3017 ("Refusal to pay access charges prohibited. — No person or entity may refuse to pay tariffed access charges for interexchange services provided by a local exchange telecommunications company.").

Pa. PUC Order at 24-25 (emphasis in the original).

GNAPs admits that it is a competitive local exchange carrier (CLEC) and is authorized to operate as such within the Commonwealth of Pennsylvania.[4] Consequently, there is no dispute that GNAPs operates as a telecommunications common carrier. Therefore, GNAPs is subject to the customary duties and obligations that relate to its provision of telecommunications services, including those that involve interstate and intrastate intercarrier compensation for the wholesale transport and termination of interexchange traffic. As its Petition plainly indicates,[5] GNAPs has or has been engaged in multistate litigation before numerous state utility commissions, various courts of appropriate jurisdiction, and now the FCC, so that it can artfully avoid these intrastate and interstate intercarrier compensation obligations. However, as the Pa. PUC Order established, the majority of these state commissions and courts of appropriate jurisdiction did not find that the FCC's *Vonage* holding prevented any of these bodies from conclusively addressing the intercarrier compensation disputes at issue.[6]

## II. Both the FCC and the States Exercise Jurisdiction On Intercarrier Compensation Matters Involving the Transport and Termination of Interexchange Traffic

Largely relying on various press releases that at times were issued by members of the FCC — where such press releases do not have in and of themselves the force and effect of law — GNAPs makes the huge leap to its "conclusion" that somehow "interconnecting carriers are entitled to the access charge immunity extended to VoIP providers."[7] Similarly, GNAPs argues that the FCC has exclusive jurisdiction on intercarrier compensation matters that involve the ordinary common carrier wholesale transport and termination of interexchange traffic that also includes VoIP calls. GNAPs' assertions are not grounded on either law or fact and should be summarily rejected.

---

[4] GNAPs Petition at 2. Pa. PUC Order n. 1 at 9.
[5] GNAPs Petition at 4-5.
[6] *See generally* Pa. PUC Order at 15-25. Some of the relevant cases include: *Global NAPs Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 73 (1st Cir. 2006); *Verizon New York Inc. v. Global NAPS, Inc.*, 463 F.Supp.2d 330, 342 (E.D.N.Y. 2006), 2006 U.S. Dist. LEXIS 87085; *Hollis Telephone, Inc., Kearsarge Telephone Co., Merrimack County Tel. Co., and Wilton Telephone Co.*, DT 08-28, Order No. 25,043 (NH PUC November 10, 2009) (NH PUC Order); *Request for Expedited Declaratory Ruling as to the Applicability of the Intrastate Access Tariffs of Blue Ridge Telephone Company, Citizens Telephone Company, Plant Telephone Company, and Waverly Hall Telephone LLC to the Traffic Delivered to Them by Global NAPs, Inc.*, Docket No. 21905 (GA PSC July 29, 2009), Order Adopting in Part and Modifying in Part the Hearing Officer's Initial Decision, Document No. 121910 (GA PSC Order).
[7] GNAPs Petition at 30.

A voluminous evidentiary record was developed before the Pa. PUC during the course of the formal complaint adjudication involving GNAPs refusal to pay intrastate intercarrier compensation for the indirect termination of interexchange traffic to the PSTN facilities of Palmerton Telephone Company (Palmerton) a rural ILEC operating in Pennsylvania. This evidentiary record conclusively established that contrary to the GNAPs practice of non-payment of *both* intrastate *and* interstate intercarrier compensation for the termination of interexchange traffic at Palmerton's PSTN facilities, other entities that also directly or indirectly terminate the same types of traffic in the switched access network of the same ILEC — including calls that originally are initiated in a fixed VoIP protocol —do pay the jurisdictionally prescribed and appropriate amounts of intercarrier compensation in accordance with Palmerton's switched carrier access tariffs. The Pa. PUC Order states in relevant part the following:

> The majority of Pennsylvania and federal legal authority that has already been discussed points to the inescapable conclusion that the Commission has the appropriate subject matter jurisdiction over Palmerton's Formal Complaint. The next issue is whether this Commission's intrastate subject matter jurisdiction and the proper and lawful application of intrastate carrier access charges are somehow altered or nullified because of the presence of the allegedly "unique" VoIP or IP-enabled calls in the traffic that is transported by GNAPs and indirectly terminated at Palmerton's PSTN facilities.
>
> The answer can be readily found in the evidentiary record that amply and credibly documents the routine application of Palmerton's intrastate carrier access tariff to intrastate interexchange traffic containing VoIP or IP-enabled calls *irrespective* of their final communication protocol conversion in their transport and final termination by Palmerton. This routine application of Palmerton's intrastate carrier access tariffs on the appropriate traffic has resulted in a corresponding absence of intercarrier compensation disputes in the ordinary and established course of intercarrier compensation business dealings.
>
> For example, cable companies such as Adelphia, Comcast, and RCN *originate* fixed VoIP or IP-enabled wireline interexchange calls that terminate at Palmerton's PSTN's facilities. When Palmerton directly bills these companies under its intrastate carrier access tariff for the termination of these intrastate interexchange calls to its facilities, Palmerton receives the appropriate amount of intercarrier compensation irrespective of whether these fixed VoIP or IP-enabled originated wireline calls have been converted to a TDM protocol prior to their final termination at Palmerton's PSTN facilities. Tr. 519-520. *See also* Palmerton Exh. 12 at 27-28 (Comcast Deposition), and Palmerton Exc. at 30-31.

> The same also happens with the fixed VoIP or IP-enabled intrastate interexchange wireline calls that Palmerton terminates from its own affiliate Blue Ridge Digital Phone, a cable company, where such calls first transit through Sprint's common carrier telecommunications network prior to reaching Palmerton's PSTN. Sprint pays Palmerton the appropriate intrastate intercarrier compensation. Tr. 518-519, 536. Further, other companies, such as Service Electric, that also engage in the common carrier telecommunications transit transport of intrastate interexchange VoIP or IP-enabled originating wireline traffic behave in a similar and ordinary fashion. Tr. 631-633, 636. (The more unique aspects of intercarrier compensation that apply on intrastate interexchange wireless calls terminating at the PSTN facilities of an ILEC such as Palmerton are addressed below.)

Pa. PUC Order at 29-31 (footnotes omitted).[8]

Despite the ordinary treatment of interexchange traffic, inclusive of calls initiated in an IP-enabled protocol, for jurisdictional intercarrier compensation purposes by the majority of telecommunications carriers and other entities that directly or indirectly terminate such traffic at Palmerton's PSTN facilities, GNAPs requests that its common carrier telecommunications services should somehow be accorded "special and differential treatment" by the FCC. Essentially, GNAPs requests that it should be able to utilize the switched access network facilities of other telecommunications carriers such as those of Palmerton for free when indirectly terminating the interexchange traffic that it transports. This unfounded GNAPs request leaves unanswered one rather important question. How and from whom the jurisdictional switched network access costs for the termination of GNAPs transported interexchange traffic will be recovered when GNAPs refuses to pay *both* interstate and intrastate carrier access charges to the carrier that terminates GNAPs' traffic? GNAPs may erroneously believe that as an "intermediate carrier" is somehow immune from the imposition of jurisdictional carrier access charges for the interexchange traffic that it transports and indirectly terminates at the access network facilities of other telecommunications carriers.[9] However, as the Pa. PUC ascertained, other wholesale CLEC transporters of interexchange traffic such as

[8] The Pa. PUC also observed that the "evidentiary record indicates that at least four more companies, other than GNAPs, have refused to pay terminating access charges to Palmerton and other ILECs, with at least one more intercarrier compensation dispute between one or more ILECs and one of those four companies currently pending before" the Pa. PUC. Pa. PUC Order n. 20 at 31 citing Tr. 532.

[9] GNAPs Petition at 23.

Sprint that fit the GNAPs classification of "intermediate carrier" abide by the well accepted and routinely practiced legal and technical principles of jurisdictional intercarrier compensation.[10]

The United States Court of Appeals for the First Circuit has pointed out the flaws in GNAPs' arguments that the FCC has exclusive jurisdiction in intercarrier compensation matters which pertain to interexchange information service provider (ISP) bound traffic between GNAPs and Verizon New England. The First Circuit stated:

> Global NAPs' argument ignores an important distinction. The FCC has consistently maintained a distinction between local and "interexchange" calling and the intercarrier compensation regimes that apply to them, and reaffirmed that states have authority over intrastate access charge regimes. Against the FCC's policy of recognizing such a distinction, a clearer showing is required that the FCC preempted state regulation of both access charges and reciprocal compensation for ISP-bound traffic.

*Global NAPs Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 73 (1st Cir. 2006). *See also* Pa. PUC Order at 16-17.

The same GNAPs arguments that pertain to intercarrier compensation for the indirect termination of interexchange traffic that includes IP-enabled calls must fail for the same reason.

GNAPs' reliance on the United States Court of Appeals for the Eighth Circuit decision concerning Vonage and the Nebraska Public Service Commission (NE PSC) Universal Service Fund (USF)[11] is equally inapplicable for GNAPs' proposition that the FCC has or should have exclusive jurisdiction over intercarrier compensation matters that involve the indirect termination of interexchange traffic inclusive of IP-enabled calls.[12] The Pa. PUC carefully examined this argument in the context of the relevant formal complaint adjudication involving GNAPs and stated the following:

> Both the Initial Decision and GNAPs refer to the refusal of the federal courts to permit the collection of state universal service fund (USF) intrastate assessment surcharges by a nomadic VoIP provider in accordance with pertinent directives of the Nebraska Public Service Commission (NE PSC) for the broad proposition that "nomadic interconnected VoIP service has been preempted from

[10] Pa. PUC Order at 30.
[11] *Vonage Holdings Corp. v. Nebraska Pub. Serv. Comm'n*, 564 F.3d 900 (8th Cir. 2009).
[12] GNAPs Petition at 15-16.

state regulation by the FCC." The "jurisdictional mix" issue of the telecommunications traffic that is carried by GNAPs and terminated at the Palmerton PSTN facilities is addressed below.

> The federal court decisions are not applicable on the issue of subject matter jurisdiction in the case before us. First, we are not dealing here with the retail services of an interconnected albeit nomadic VoIP service provider. Neither are we trying to apply regulation that would have had the potential of touching the intrastate retail operations of an interconnected nomadic VoIP provider such as Vonage, e.g., through (hypothetically) Pennsylvania USF contribution assessments on Vonage's intrastate *retail* operations under our Pa. USF regulations at 52 Pa. Code § 63.161 *et seq.* Instead, we are dealing with GNAPs' *wholesale transport (inclusive of VoIP or IP-enabled calls), access to and termination of traffic in* Palmerton's PSTN network facilities, and these are clearly telecommunications functions and services under the Commission's jurisdiction in accordance with applicable Pennsylvania and federal law. Second, the practical effects of the *Vonage v. NE PSC* federal court decisions still remain unsettled and are currently pending before the FCC. Finally, this Commission is technically well equipped and legally entitled to address the issues of jurisdictional traffic allocation in disputes involving intercarrier compensation for the provision of wholesale telecommunications carrier access services. Such a determination is essential in determining the type and appropriate level of intercarrier compensation for the various jurisdictional classifications of traffic that terminates at Palmerton's PSTN facilities. Again, in contrast to the *Vonage v. NE PSC* federal court decisions, this Commission is not dealing here with jurisdictional traffic allocations that relate to the retail operations, services, and revenues of a nomadic VoIP provider.

Pa. PUC Order at 27-28 (footnotes omitted, emphasis in the original).[13]

Legally unsettled issues of state USF assessments on the intrastate retail revenues of a nomadic VoIP service provider cannot be equated with well established legal and technical parameters that govern interstate and intrastate intercarrier compensation for the wholesale transport of interexchange traffic that is performed by GNAPs, a self-acknowledged and duly classified telecommunications CLEC carrier, and where such traffic indirectly terminates at the switched access network facilities of another telecommunications carrier. GNAPs' reliance on the Eighth Circuit decision does not advance its argument about the alleged exclusive jurisdiction of the

[13] The Pa. PUC Order referenced the FCC proceeding *Petition of the Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues,* FCC WC Docket No. 06-122, filed July 16, 2009; NE PSC and Kansas Corp. Comm'n *Ex Parte*, FCC WC Docket No. 06-122, filed December 30, 2009.

FCC on intercarrier compensation for the transport and termination of interexchange traffic that includes IP-enabled calls.

## III. The FCC's *Time Warner* Decision Does Not Mandate A Single Type of Intercarrier Compensation Nor Does It Absolve GNAPs from Jurisdictional Intercarrier Compensation Responsibilities for Interexchange Traffic Termination

GNAPs' interpretation of the FCC's landmark *Time Warner* decision is problematic.[14] GNAPs makes the unfounded assertion that "the conclusions of the state commissions that VoIP providers may be exempt from access charges but that the interconnecting carriers that carry their traffic towards termination are not, directly contradicts the FCC's decision in *Time Warner*."[15] Similarly, GNAPs argues that "*Time Warner* explains arms-length negotiations, *not tariffs*, must apply to traffic like Global's," and that "*Time Warner's* holding only reinforces the *inapplicability of tariffs* to services developing post enactment of the Act [federal Telecommunications Act of 1996 or TA-96]," and that "[u]nder the 1996 Act, *reciprocal compensation is the norm*; access charges apply *only* where there is a 'pre-Act obligation relating to intercarrier compensation'."[16] First, these GNAPs assertions are self-contradictory. On one hand GNAPs appears to argue that the FCC's *Time Warner* decision advocates that "interconnecting carriers" transporting VoIP traffic should somehow be totally "exempt from access charges." However, at the same time GNAPs also proposes that if any intercarrier compensation regime should apply to the interexchange traffic that it transports, that regime should be limited to reciprocal compensation rates and not interstate or intrastate carrier access charges. Second, the Pa. PUC examined and relied on the FCC's *Time Warner* decision in the formal complaint adjudication that addressed GNAPs' non-payment of intrastate intercarrier compensation for the indirect termination of interexchange traffic. The Pa. PUC quoted the following relevant part of the FCC's *Time Warner* decision:

---

[14] *In re Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55 (FCC March 1, 2007), Memorandum Opinion and Order, DA-07-709, *slip op.* (*Time Warner* FCC decision).
[15] GNAPs Petition at 31.
[16] GNAPs Petition at 21 (emphasis added, footnote omitted).

> 17. Certain commenters ask us to reach other issues, including the application of section 251(b)(5) and the classification of VoIP services. [*See, e.g.*, Qwest Comments at 6 ("The Nebraska position is obviously dependent on how the Commission ultimately classifies VoIP service").] We do not find it appropriate or necessary here to resolve the complex issues surrounding the interpretation of Title II more generally or the subsections of section 251 more specifically that the Commission is currently addressing elsewhere on more comprehensive records. [*See, e.g., Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, CC Docket No. 01-92, 20 FCC Rcd 4685 (2005).] For example, the question concerning the proper statutory classification of VoIP remains pending in the *IP-Enabled Services* docket. [*IP-Enabled Services*, 20 FCC Rcd at 10245. Similarly, we disagree with the assertions that it is necessary to complete the proceedings pending in the IP-enabled services, intercarrier compensation, and universal service dockets in order to take action on or instead of taking action on this Petition. *See, e.g.*, NTCA Reply Comments at 5-6.] Moreover, in this declaratory ruling proceeding we do not find it appropriate to revisit any state commission's evidentiary assessment of whether an entity demonstrated that it held itself out to the public sufficiently to be deemed a common carrier under well-established case law. In the particular wholesale/retail provider relationship described by Time Warner in the instant petition, the wholesale telecommunications carriers have assumed responsibility for compensating the incumbent LEC for the termination of traffic under a section 251 arrangement between those two parties. We make such an arrangement an explicit condition to the section 251 rights provided herein. [*See, e.g.,* Verizon Comments at 2 (stating that one of the wholesale services it provides to Time Warner Cable is "administration, payment, and collection of intercarrier compensation, including exchange access and reciprocal compensation"); Sprint Nextel Comments at 5 (offering to provide for its wholesale customers "intercarrier compensation, including exchange access and reciprocal compensation").] We do not, however, prejudge the Commission's determination of what compensation is appropriate, or any other issues pending in the *Intercarrier Compensation* docket.

Pa. PUC Order at 12-13, quoting *Time Warner* FCC Decision, ¶ 17, at 10-11 (original FCC footnotes in brackets).

It is rather obvious that the Section 251, 47 U.S.C. § 251, interconnection arrangements that are addressed in the FCC *Time Warner* decision do not preclude the application of interstate and intrastate carrier access charges for the termination of interexchange traffic, and also apply the usual reciprocal compensation arrangements for the mutual movement and termination of *local* exchange traffic between interconnected wholesale CLEC and ILEC telecommunications carriers. The plain language of the FCC *Time Warner* decision speaks for itself and negates GNAPs' unfounded assertions to the contrary.

The Pa. PUC conclusively and in detail addressed the same GNAPs arguments in the relevant formal complaint adjudication in Pennsylvania. The Pa. PUC stated the following:

> In a similar fashion, GNAPs propounds the argument that the traffic it transports does not leave its local calling area "as its service never touches the local calling area," and that as an "intermediary carrier" carrying IP-enabled transit traffic it should be subjected at most to cost-based reciprocal compensation rates under Section 251 of TA-96, 47 U.S.C. § 251, for terminating such traffic at Palmerton's facilities. GNAPs MB at 21-22. This argument lacks substantive and legal merit and is merely designed to advocate the solution that GNAPs achieved through the NY PSC [New York Public Service Commission] *TVC v. GNAPs* decision directing TVC Albany and GNAPs to "work out a traffic exchange agreement establishing rates, charges, terms and conditions for nomadic VoIP traffic." NY PSC *TVC v. GNAPs* decision at 17. GNAPs also points out the lower reciprocal compensation rate that exists in Commission approved interconnection agreements between Verizon PA and various CLECs for the exchange of VoIP traffic. Tr. 692, 700-704, and Verizon PA Exh. 1.
>
> This argument must fail for multiple reasons. First, GNAPs' traffic termination at Palmerton's facilities is indirect under Section 251(a)(1) of TA-96, 47 U.S.C. § 251(a)(1), and Palmerton was clearly obliged to terminate the traffic and did so until on or about May 19, 2009 when GNAPs ceased sending traffic to Palmerton. Tr. 514, 904.
>
> Second, GNAPs does not have a local calling area presence in Palmerton's service area, nor does it have a direct interconnection agreement.
>
> Third, assuming *arguendo* that GNAPs would seek interconnection with Palmerton and cost-based TELRIC [total element long-run rates for the indirect termination of its IP-enabled traffic at Palmerton's facilities — and nothing of this sort has happened here — it would have to initiate the appropriate interconnection request and Palmerton, as a rural ILEC, could invoke the relevant provisions of Section 251(f) of TA-96, 47 U.S.C. 251(f).
>
> Finally, following the receipt of Palmerton's billing invoices, GNAPs could have approached Palmerton in order to initiate good faith negotiations for a traffic exchange agreement encompassing the subject of IP-enabled traffic. This has not happened.
>
> In summary, we are faced with the same situation as in New Hampshire where the NH PUC found that GNAPs, despite its assertions to the contrary, was indirectly delivering intrastate interexchange traffic to the PSTN facilities of the New Hampshire TDS ILECs. NH PUC Order at 22-23.

Pa. PUC Order at 33-35 (footnotes omitted). [17]

It is indeed peculiar that a number of telecommunications carriers that operate in Pennsylvania have voluntarily agreed under Pa. PUC approved Section 251 interconnection arrangements to compensate each other for the mutual termination of interexchange VoIP traffic on the basis of existing and applicable interstate and intrastate carrier access tariffs, and GNAPs alleges that this method of intercarrier compensation somehow "contradicts" the FCC's *Time Warner* decision.

## IV. The Current System of Jurisdictional Intercarrier Compensation for Interexchange Traffic Is Lawful, Technically Valid, and Technology Neutral

GNAPs seeks to invalidate the current system of jurisdictional intercarrier compensation for interexchange traffic so that its wholesale common carrier transport of various types of calls, including those that were originally initiated in an IP-enabled protocol, and the indirect termination of such traffic at the switched access network facilities of other telecommunications common carriers is simply "cost free" to GNAPs. For this reason, GNAPs considers the conventional tools for determining jurisdictional intercarrier compensation for interexchange traffic such as the local exchange routing guide (LERG), the North American Numbering Plan (NANP) number information, and by extension other data bases and carrier billing systems (e.g., Telcordia terminal point master data base, carrier access billing system or CABS, etc.), as being

[17] The Pa. PUC Order also noted that the relevant reciprocal compensation rate mentioned in the record for the exchange of VoIP traffic was $0.00045 per minute. The Pa. PUC Order also pointed out that various *voluntary* interconnection agreement arrangements have been approved by the Pa. PUC that address the exchange of VoIP traffic. *See generally Joint Petition of Verizon Pennsylvania Inc. and XO Communications Services, Inc. for Approval of Amendment No. 8 to an Interconnection Agreement Under Section 252(e) of the Telecommunications Act of 1996*, Docket No. A-2009-2085611, Pa. PUC Order entered March 27, 2009 (use of interstate and intrastate terminating switched access rates under certain conditions for "Interexchange VOIP Traffic"); *Joint Petition of Windstream Pennsylvania, LLC and Service Electric Telephone Company, LLC for Approval of an Interconnection Agreement Under Section 252(e) of the Telecommunications Act of 1996*, Docket No. A-2009-2145812, Pa. PUC Order adopted on February 11, 2010 ("all traffic, other than Local Traffic, that is terminated on the public switched network, regardless of the technology used to originate or transport such traffic, including but not limited to Voice Over Internet Protocol (VOIP) will be assessed either interstate or intrastate (depending on the end points of the call) terminating charges at the rates provided in the terminating Party's access tariff"). Pa. PUC Order n. 22 at 34; *see also* Statement of Pa. PUC Vice Chairman Tyrone J. Christy at 2-3 and n. 2.

totally irrelevant for its interexchange traffic that eventually, albeit indirectly, needs to be terminated at a cost by another telecommunications carrier.[18]

On the basis of a fully developed and fact-specific evidentiary record the Pa. PUC disposed of GNAPs' arguments as follows in the related Pennsylvania formal complaint adjudication involving GNAPs:

> Palmerton's witness further testified that, when the indicator information on a terminated interexchange call is ambiguous or incomplete in its carrier access billing system (CABS), or the call has incomplete originating NPA/NXX telephone number information, the call is defaulted to a lower interstate carrier access rate rather than the highest intrastate one. Tr. 549. Although Palmerton follows standard industry practices for the jurisdictional classification, access rating, and billing of interexchange calls, it cannot identify the actual physical location of the calling party. For example, if a caller using a wireless phone with an assigned "610" area code number (Southeastern Pennsylvania) calls a Palmerton end-user customer from Manhattan, City of New York, NY, Palmerton will identify and rate this interexchange wireless call as if it originated somewhere in Southeastern Pennsylvania. Tr. 570-571.
>
> The existing state of carrier access billing system technologies and industry practices do not yet permit such a precise location identification of a calling party; neither was Palmerton aware of any network signaling system that would permit such a precise identification. Tr. 579. Furthermore, the evidentiary record indicates that since VoIP or IP-enabled calls are transformed into the TDM protocol prior to their final termination in Palmerton's PSTN facilities (Verizon PA's tandem switch on Market St., Philadelphia, Pa., will forward the traffic to Palmerton in TDM protocol), Palmerton cannot technologically determine whether such calls originated in IP format in the first place. Tr. 382, 849-850, GNAPs Exh. 6 (routing of Vonage nomadic VoIP traffic). Palmerton also testified that it relies on billing records that are generated at and received from the Verizon PA Market Street, Philadelphia, Pa., tandem switch, and that GNAPs "has not sent traffic to Palmerton with information identifying underlying carriers, so, as some other carriers do." Tr. 267.
>
> Palmerton's use of the billing information generated and received from Verizon PA's tandem switch for the jurisdictional classification and rating of calls that terminate at Palmerton's facilities, and the relative reliability and precision of such information or associated lack thereof (treatment of calls with missing billing information), was independently corroborated through the testimony of Verizon PA. The Verizon PA testimony established that its tandem switch

[18] GNAPs Petition at 16-17.

identifies the traffic that it receives from GNAPs which is then passed on and terminated in Palmerton's PSTN facilities. However, the Verizon PA tandem switch does not identify whether particular GNAPs calls that eventually terminate at Palmerton's network have originally been IP-enabled. *See generally* Tr. 667-681, 685-691.

In short, Palmerton finds itself in the same situation as the TDS ILECs in New Hampshire where all interexchange IP-enabled originating traffic that came from GNAPs and terminated at their PSTN facilities appeared to be traditional voice traffic that was subject to the appropriate jurisdictional carrier access charges in accordance with their applicable intrastate and interstate carrier access tariffs. NH PUC Order at 21-22.

GNAPs focuses on the various movements of nomadic VoIP calls prior to their eventual termination at Palmerton's facilities for the proposition that all such calls should be classified as interstate and, thus, potentially accrue lower interstate access charges. Palmerton MB at 23-24. This argument must fail for the following reasons. First, as it has been stated before, GNAPs has *not paid any* access charges either interstate or intrastate. Second, here we are not dealing with individual end-user retail calls to ISPs. Instead, we are dealing with the wholesale telecommunications transport movement and termination of interexchange traffic that includes VoIP or IP-enabled calls. In these circumstances, the FCC has opined as follows:

> We agree with Bell South that AT&T's service is not analogous to ISP-bound traffic. Although a call to an ISP may include multiple communications, the only relevant communication in the case presented by AT&T is from the calling card caller to the called party. Moreover, even if there are multiple communications, the Commission [FCC] has found that neither the path of the communication nor the location of any intermediate switching point is relevant to the jurisdictional analysis.
>
> FCC AT&T Prepaid Calling Card Order, ¶ 26 at 10. [*In re AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services et al.*, WC Docket Nos. 03-133 and 05-68 (FCC Rel. February 23, 2005), Order and Notice of Proposed Rulemaking, FCC 05-41, *slip op.* (FCC AT&T Prepaid Calling Card Order rejecting AT&T declaratory ruling petition that access charges do not apply to "enhanced" calling card service with advertising message to the end-user consumer)].

We find that prior management or movement of a call communication is not dispositive of its jurisdictional classification when, as here, the NPA/NXX origin and termination of the call are clearly intrastate on the basis of available billing information, associated technologies, and established industry practices for

> the purposes of establishing the appropriate level of intercarrier compensation. In the present factual situation, and in accordance with the evidentiary record, we cannot classify a call – even an interconnected nomadic VoIP call – as interstate simply because it may have moved across the Commonwealth's boundaries while the relevant call origination and termination information clearly indicates an intrastate interexchange classification. We note that even conventional circuit-switched non-VoIP interexchange calls that originate in Pennsylvania are often transported out-of-state before their subsequent in-state termination within the Commonwealth. However, such intermediate transport does not transform the jurisdictional classification of such calls to "interstate." Furthermore, the accompanying SS7 signaling for such calls can and does cross state boundaries (depending on the physical location of the utilized SS7 nodes) in order to independently establish the most optimal path for the transmission and termination of these circuit-switched interexchange calls.
>
> Although the FCC has not yet formally proceeded with any jurisdictional classification of interconnected VoIP calls, it still expects state utility regulatory commissions to deal with and resolve intercarrier compensation disputes that may implicate interconnected VoIP. *See generally, In re Petition of UTEX Communications Corporation, Pursuant to Section 252(e)(5) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas*, WC Docket No. 09-134 (FCC Rel. October 9, 2009), Memorandum Opinion and Order, DA 09-2205. Finally, the FCC fully expects state utility regulatory commissions to address intercarrier compensation issues that involve intrastate traffic and access matters. *See generally, North County Communications Corp. v. MetroPCS California, LLC*, File No. EB-06-MD-007 (FCC March 30, 2009), Memorandum Opinion and Order, DA 09-719.
>
> Based on the case-specific evidentiary record, we find that Palmerton adequately relied on the NPA/NXX origination and termination of the intrastate interexchange call traffic at issue for the jurisdictional classification and billing of such traffic. Such reliance is consistent with the *Core Appeal Decision* in some other but still rather important respects. *Core Appeal Decision*, 941 A.2d 758 and n.10 (classification of NXX codes and local calling areas).

Pa. PUC Order at 39-43 (footnotes omitted).

The FCC should decline GNAPs' self-serving invitation to essentially subvert the existing lawful, technically valid, and technology neutral jurisdictional intercarrier compensation system that is currently in operation for handling and terminating interexchange traffic inclusive of calls that have been initiated in an IP-enabled protocol. To do otherwise, it will simply invite an unnecessary but unending cycle of jurisdictional intercarrier compensation disputes that would center on the handling and termination of interexchange traffic, and where such disputes

will have to be extensively litigated both before the state utility regulatory commissions such as the Pa. PUC and the FCC. The present proceeding provides an illustrative example of this needless process if the FCC were to follow GNAPs' unfounded arguments.

The FCC also cannot rely on GNAPs' inapplicable interpretation of the United States District Court for the District of Columbia decision in a case involving an intercarrier compensation dispute for interexchange traffic between PAETEC Communications, Inc. (PAETEC) and CommPartners, LLC (CommPartners).[19] First, the federal District Court erroneously relied on the simple protocol conversion of VoIP calls to a time division multiplexing (TDM) format by CommPartners for onward termination at PAETEC's common carrier telecommunications network as fundamentally transforming the relevant traffic to an "information service" not subject to any jurisdictional intercarrier compensation.

Faced with a generally parallel argument in the Pennsylvania-specific formal complaint adjudication involving GNAPs the Pa. PUC thoroughly examined the applicable federal standards for the classification of "information services" and ruled as follows on the basis of the fact-specific evidentiary record:

> The evidence in this proceeding fails to establish that the nomadic VoIP traffic that GNAPs receives from other entities is somehow already or becomes "'enhanced' (significantly changed in form and/or contents)." GNAPs R Exc. at 5-6. The Initial Decision provides the following federal definitions for "enhanced" and "information" services:
>
> > The term "enhanced service" means:
> >
> > [S]ervices, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. 47 C.F.R. § 64.702(a) [*sic*].
> >
> > Information service. — The term "information service" means the offering of a capability for generating, acquiring, storing,

[19] *PAETEC Communications, Inc. v. CommPartners, LLC,* No. 08-0397, *slip op.* (D.D.C. February 18, 2010) (*PAETEC v. CommPartners*). GNAPs Petition n. 28 at 13-14.

> transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, *but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.* 47 U.S.C. § 153(20).
>
> ID at 23 and n. 11 (emphasis added).

GNAPs argues that Transcom's removal of background noise, the insertion of white noise, the insertion of computer developed substitutes for missing content, and the added capacity for the use of short codes to retrieve data during a call all constitute "enhancements" to the traffic that Transcom passes on to GNAPs. GNAPs MB at 18-19, Tr. 960-962. Palmerton responds that the removal of background noise, the insertion of white noise, and the reinsertion of missing digital packets of an IP-enabled call in their correct location when all the packets of the call become assembled are essentially ordinary "call conditioning" functionalities that are "adjunct to the telecommunications provided by Transcom, not enhancements," and that similar call conditioning has been practiced for a very long time even in the more traditional circuit-switched voice telephony. *See generally* Palmerton Exc. 35-38, Tr. 1046-1047, ID at 24. The FCC has ruled that:

> Adjunct-to-basic services are services that are "incidental" to an underlying telecommunications service and do not "alter [] their fundamental character" even if they may meet the literal definition of an information service or enhanced service.... We find that the advertising message provided to the calling party in this case is incidental to the underlying [AT&T calling card] service offered to the cardholder and does not in any way alter the fundamental character of that telecommunications service. From the customer's perspective, the advertising message is merely a necessary precondition to placing a telephone call and therefore the service should be classified as a telecommunications service.
>
> *In re AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services et al.*, WC Docket Nos. 03-133 and 05-68 (FCC Rel. February 23, 2005), Order and Notice of Proposed Rulemaking, FCC 05-41, *slip op.* ¶ 16 at 6 (citations omitted) (FCC AT&T Prepaid Calling Card Order rejecting AT&T declaratory ruling petition that access charges do not apply to "enhanced" calling card service with advertising message to the end-user consumer).

In the case involving AT&T's use of IP "in the middle" and its request that "its 'phone-to-phone Internet protocol (IP) telephony services are exempt

from the access charges applicable to circuit-switched interexchange calls," the FCC stated the following in denying AT&T's request:

> More specifically, AT&T does not offer these customers a "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information;" therefore, its service is not an information service under section 153(20) of the Act. End-user customers do not order a different service, pay different rates, or place and receive calls any differently than they do through AT&T's traditional circuit-switched long distance service; the decision to use its Internet backbone to route certain calls is made internally by AT&T. To the extent that protocol conversions associated with AT&T's specific service take place within its network, they appear to be "internetworking" conversions which the Commission has found to be telecommunications services. We clarify, therefore, that AT&T's specific service constitutes a telecommunications service.
>
> *In re Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361 (FCC Rel. April 21, 2004), Order, FCC 04-97, *slip op.* ¶¶ 1 and 12, at 1, 9 (citations omitted) (FCC AT&T IP in the Middle Order).

In view of the evidence presented and the FCC's rulings in the two AT&T cases referenced above, we find that Transcom does not supply GNAPs with "enhanced" traffic under applicable federal rules. Consequently, such traffic cannot be exempted from the application of appropriate jurisdictional carrier access charges. Also, the Commission is not persuaded by the decision of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, finding Transcom to be an "enhanced services provider" on the basis that Transcom indicated in that proceeding that it provided "data communications services over *private* IP networks (VoIP)." *In re Transcom Enhanced Services, LLC*, No. 05-31929-HDH-11 (Bkrptcy. N.D.Tex., April 28, 2005) at 2 (emphasis added).

Pa. PUC Order at 35-38

Arguably, assuming that the federal District Court reached the correct "information service" classification for the CommPartners interexchange traffic — a highly unlikely result given the FCC's own pronouncements in its AT&T IP in the Middle decision — GNAPs simply cannot claim that CommPartners is "a carrier similarly situated to Global."[20] Furthermore, it is obvious from the *PAETEC v. CommPartners* federal District Court decision that CommPartners was

[20] GNAPs Petition n. 28 at 14.

willing to pay federal carrier access charges for the TDM interexchange traffic terminating at PAETEC's facilities,[21] when GNAPs has exhibited the propensity of not paying *any* jurisdictional intercarrier compensation for its interexchange traffic that indirectly terminates at the facilities of other telecommunications common carriers.

Finally, the federal District Court decision in *PAETEC v. CommPartners* creates the significant problem that it is not technology neutral in matters pertaining to jurisdictional intercarrier compensation for interexchange traffic. The Court's misplaced classification of interexchange traffic as "information service" when there is an intranetwork VoIP to TDM protocol conversion will simply render invalid the existing lawful, well established, and technology-neutral system of jurisdictional intercarrier compensation.

## V. Granting GNAPs' Requests for Relief Will Create Unwarranted Anti-Competitive Results in Violation of Applicable Federal and State Laws

GNAPs' refusal to pay any jurisdictional intercarrier compensation for the indirect termination of its interexchange traffic is already creating unwarranted anti-competitive results that are not sustainable on the basis of applicable federal and state law. The Pa. PUC addressed this issue in detail:

> Now that the legal and technical reasons for exercising subject matter jurisdiction in this intercarrier compensation dispute have been discussed and the fundamental merits of the Palmerton Complaint have been sustained, broader regulatory policy issues must also be covered. In our May 5, 2009 Order, we noted that, if "certain competing telecommunications carriers pay intercarrier compensation for VoIP traffic termination, while others take the position that they may avoid such payments for the termination of similar traffic, there can be an anticompetitive environment that artificially and inimically transmits inaccurate price signals to end-user consumers of telecommunications and communications services." Docket No. C-2009-2093336, Order entered May 5, 2009, at 8-9. One of the statutory policy directives in Chapter 30 of the Public Utility Code mandates this Commission to:
>
> > Promote and encourage the provision of competitive services by a variety of service providers *on equal terms* throughout all geographic areas of this Commonwealth without jeopardizing the

[21] *PAETEC v. CommPartners* at 11 ("CommPartners concedes its duty to pay access charges for TDM-originated calls").

> provision of universal telecommunications service at affordable rates.
>
> 66 Pa. C.S. § 3011(8) (emphasis added).

It is obvious that a telecommunications carrier that needs and obtains Palmerton's intrastate carrier access services at the prescribed jurisdictional rates that the carrier then pays to Palmerton will be competitively but artificially disadvantaged if another carrier obtains the same Palmerton carrier access services and pays no intercarrier compensation.

The FCC has expressed similar concerns:

> The Commission [FCC] is sensitive to the concern that *disparate treatment* of voice services that both use IP technology and interconnect with the PSTN could have *competitive implications*. We note that all telecommunications services are subject to our existing rules regarding intercarrier compensation. Consequently, when a provider of IP-enabled voice services contracts with an interexchange carrier to deliver interexchange calls that begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN, the interexchange carrier is obligated to pay terminating access charges. Our analysis in this order applies to services that meet these criteria regardless of whether only one interexchange carrier uses IP transport or instead multiple service providers are involved in providing IP transport. Thus our ruling here should not place AT&T at a competitive disadvantage. We are adopting this order to clarify the application of access charges to these specific services to remedy the current situation in which some carriers *may be paying access charges for these services while others are not.*
>
> FCC AT&T IP in the Middle Order, ¶ 19 at 13-14 (emphasis added, citations omitted).

In view of the specific facts that have been presented, GNAPs' non-payment of intrastate carrier access charges to Palmerton cannot be condoned as a matter of law and as a matter of sound regulatory policy. This conclusion is based on existing Pennsylvania and federal law and this Commission's subject matter jurisdiction to resolve intercarrier compensation disputes.

Pa. PUC Order at 45-46.

It is also patently obvious that if GNAPs' requests for relief were to be granted by the FCC, the result would also create perverse disincentives for the necessary capital investments in network

access facilities by telecommunications common carriers since such facilities would be utilized at no cost by GNAPs and potentially by other "similarly situated" entities.

## VI. Federal Preemption Is Not Warranted

GNAPs mistakenly relies on the FCC's preemption authority under federal law as support for the proposition that the Pa. PUC decision should be preempted. GNAPs' approach does not meet the requirements of Section 252(d) nor is it consistent with the FCC's own precedent.

Section 252(d) directs the FCC to preempt, to the extent necessary, the enforcement of any State or local statute, regulation, or legal requirement that is proscribed by Section 253(a) and is outside the authority reserved for State and local governments under Section 253(b). Section 253(a) provides:

> [n]o State or local statute or regulation, or other State or local requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

Section 253(b) provides that nothing in Section 253:

> Shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications, and safeguard the rights of consumers.

The FCC's approach in making preemption determinations is very careful and mindful of the precarious balance between state and federal regulation. The FCC has long had a two-part test for determining whether to preempt a state.

The FCC first determines whether the legal requirements are proscribed by the terms of Section 253(a). If the FCC finds that the provisions are proscribed by Section 253(a), considered in isolation, the FCC next determines whether they fall within the exception to Section 253(a) set forth in Section 253(b). The FCC only preempts if the requirements are impermissible under Section 253(a) and do not satisfy the requirements of Section 253(b). Importantly, the FCC does not preempt if the requirement proscribes Section 253(a) but meets Section 253(b) considered in

isolation.[22] In addition, the FCC does not preempt if the requirement is competitively neutral and is necessary to advance certain specified public interest objectives.[23]

The FCC previously rejected attempts to preempt Pennsylvania law based on claims that Pennsylvania law on the legal treatment of wholesale service was inconsistent with federal law.[24] The FCC rejected that claim and found that Pennsylvania law was entirely consistent with federal law in holding that wholesale and retail service constituted "telecommunications" service, particularly in the *DQE* and *Fiber Optics* decisions.

In *DQE* and *Fiber Optics,* the FCC examined Pennsylvania law and concluded that Pennsylvania, like federal law, recognized that wholesale common carrier service constituted "telecommunications" under state and federal law. Incumbent carriers cannot refuse access to Section 251 pole attachment rights simply because the transmission path services provided by a common carrier wholesale provider may accommodate "information" services. The FCC made that determination by an approach similar to *Time Warner*. That approach is appropriate here.

The FCC reasoned that wholesale service provided by a common carrier provider is "telecommunications" even if the services provided over that wholesale intercarrier connection may not be telecommunications. The FCC holdings in *Time Warner* and *DQE* or *Fiber Optics* do not stand for the proposition that a state-certificated common carrier provider of wholesale service is not responsible for remitting compensation to other carriers for services rendered.

Pennsylvania relies on FCC precedent to certificate competitive providers of common carrier wholesale service in service territories regardless of the nature of the services provided over that network. Pennsylvania has preceded the FCC in determining that common carrier wholesale service is telecommunications.[25]

---

[22] *In re: Silver Star Telephone Company,* Docket No. CCB Pol 97-1 (September 24, 1997), paragraph 38.
[23] *In re: American Communications Services, Inc.,* Docket No. 97-100 (December 23, 1999), paragraph 9.
[24] *In the Matter of DQE Communications, Inc. v. North Pittsburgh Telephone Company,* File No. EB-05-MD-027 (February 2, 2007) (*DQE*); *In re: Fiber Technologies Networks, Inc. v. North Pittsburgh Telephone Company,* File No. EB-05-MD-014 (February 23, 2007) (*Fiber Optics*) (Pennsylvania law and federal law are consistent on wholesale and retail service under state and federal law).
[25] *Rural Tel. Co. Coalition v. Pa. Pub. Util. Comm'n,* 941 A.2d 751 (Pa. Cmwlth. 2008). *See also Application of Sprint Communications Company L.P. For Approval of the Right to Offer, Render, Furnish or Supply Telecom-*

In this case, GNAPs is a common carrier provider of wholesale service, particularly interexchange service. GNAPs, however, has refused to remit compensation to other carriers.

GNAPs asks the FCC to uphold their wrongful refusal to remit compensation. GNAPs asks the FCC to agree that federal law prohibits state commissions from addressing a common carrier wholesale provider's responsibility to remit compensation for service rendered. GNAPs claims are neither correct nor consistent with *Time Warner*.

The FCC has not made those determinations. But, even if the FCC had ruled that all VoIP is "information" service and that all VoIP is "exempt" from access charges, those FCC determinations addressed *retail* VoIP. Those FCC decisions do not address the *Time Warner* mandate that a common carrier *wholesale* provider of telecommunications assumes responsibility to compensate other carriers for services rendered from another carrier that facilitate *wholesale* service. The only way to do that would be the abrogation of *Time Warner*

GNAPs Petition does not meet the FCC's preemption test. GNAPs presents no preemption claim that the Pennsylvania requirement i.e., that a common carrier provider of wholesale service assumes the responsibility to remit compensation for services rendered, is a burdensome requirement that prohibits or has the effect of prohibiting GNAPs from providing any interstate or intrastate telecommunications service in violation of Section 253(a).

The Pa. PUC's order is entirely consistent with the neutral requirement that all common carrier providers of wholesale telecommunications assume the responsibility to remit compensation for services rendered by other carriers. The Pa. PUC's order does not require GNAPs to remit payments for services that are also not expected from other carriers.

The FCC did the same in the *Time Warner* line of decisions.

---

*munications Services as a Competitive Local Exchange Carrier to the Public in the Service Territories of Alltel Pennsylvania, Inc., Commonwealth Telephone Company and Palmerton Telephone Company,* Docket Nos. A-310183F0002AMB, A-310183F0002AMC, (Pa. PUC Order entered December 1, 2006).

The PaPUC decision is consistent with the FCC's *Time Warner* line of decisions.

In addition, Section 2251.6 of Pennsylvania law, 73 Pa.C.S. § 2251.6, requires a carrier to remit compensation for interexchange services.[26] The Pa. PUC order recognizes that common carrier wholesale telecommunications service provided to GNAPs by other carriers comes within the purview of this requirement.

This legal requirement furthers a legitimate state objective consistent with Section 253(b), 47 U.S.C. § 253(b). The Pa. PUC decision ordering GNAPs to remit compensation for services rendered protects the public safety and welfare and ensures the continued quality of telecommunications services.

Public safety and welfare are ensured because networks obtain a cash flow needed to ensure that public safety service can be rendered when necessary. Public welfare is enhanced because carriers with stable cash flows for services rendered have an interest in maintaining well-functioning and reliable networks. The continued quality of telecommunications services is ensured because carriers with facilities obtain compensation from carriers using their facilities to provide service. The sum total of the compensation rendered provides incentives to facility owners to invest capital to maintain or improve narrow-band voice facilities and, increasingly, install broadband facilities capable of providing multiple types of services.

These Section 253(b) considerations support requiring carriers like GNAPs to pay for facilities they are using to obtain services. This is better than expecting facility owners to comply with Section 253(b) considerations devoid of compensation based on a misleading interpretation of state and federal law.

The Pa. PUC is concerned that preemption could undermine legitimate Section 253(b) considerations set out in Pennsylvania law that requires the Pa. PUC to ensure that intercarrier compensation is rendered for interexchange services provided by a local exchange

[26] *Voice Over Internet Protocol Freedom Act,* 73 Pa.C.S. § 2251.1

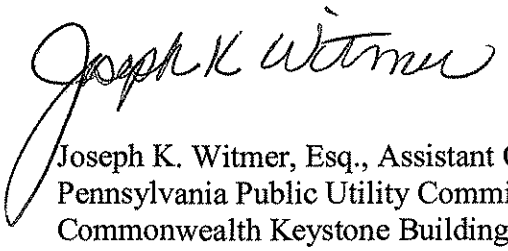
telecommunications company.[27] The Pennsylvania General Assembly determined under state law that payment for services rendered is an important Section 253(b) mandate in a manner that is entirely consistent with federal law, particularly the *Time Warner* line of decisions.

Any decision absolving GNAPs from the obligation to remit compensation for services rendered compared to other carriers puts the public safety at risk and jeopardizes the continued quality of telecommunications services. The Pa. PUC cannot absolve GNAPs of an obligation already imposed on other similarly-situated carriers, particularly for interexchange services, so that GNAPs alone can get access to facilities for free. Such a result vitiates FCC precedent, overturns Pennsylvania law, contravenes Section 253(b), and provides a benefit to one carrier compared to other similarly-situated carriers. This is neither competitively neutral nor consistent with FCC precedent and law.

**Conclusion**

For these reasons, the Pa. PUC asks the FCC to reject this GNAPs Petition.

Respectfully submitted,
Pennsylvania Public Utility Commission



Joseph K. Witmer, Esq., Assistant Counsel
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120
(717) 787-3663
Email: joswitmer@state.pa.us

Dated: April 2, 2010

[27] 73 P.S. §§ 2251.6(1)(iv) and 2251.6(1)(v). *See also* 66 Pa. C.S. § 3017(b) ("Refusal to pay access charges prohibited — No person or entity may refuse to pay tariffed access charges for interexchange services provided by a local exchange telecommunications company").

# Appendix A

**PENNSYLVANIA**
**PUBLIC UTILITY COMMISSION**
**Harrisburg, PA 17105-3265**

Public Meeting held February 11, 2010

Commissioners Present:

James H. Cawley, Chairman
Tyrone J. Christy, Vice Chairman, Statement
Kim Pizzingrilli
Wayne E. Gardner, Statement
Robert F. Powelson

Palmerton Telephone Company

v. Docket C-2009-2093336

Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and Other affiliates

## OPINION AND ORDER

**BY THE COMMISSION:**

### I. Introduction

Before the Commission for consideration and disposition are the Exceptions of Palmerton Telephone Company (Palmerton), and of Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and Other affiliates (Global NAPs), to the Initial Decision (ID) of Administrative Law Judge

Wayne L. Weismandel (ALJ) issued August 7, 2009. Reply Exceptions were filed by Palmerton, Global NAPs and Verizon Pennsylvania, Inc. (Verizon).

## II. History of the Proceeding

The history of this proceeding is very involved and is set forth with admirable clarity by the ALJ on pages 1-11 of his ID. We will, therefore, adopt that History, providing a summary here.

On March 4, 2009, Palmerton filed a multi-count Formal Complaint (Complaint) with the Commission at Docket No. C-2009-2093336, against Global NAPs. In its Complaint, Palmerton alleged that Global NAPs: (1) has refused to pay tariffed access charges for interexchange services provided by Palmerton, in violation of 66 Pa. C.S. § 3017(b); (2) has obtained interexchange traffic termination service from Palmerton without submitting an access service request, in violation of Palmerton's tariff; (3) has asserted a bad faith dispute of the carrier access bills (CABs) submitted by Palmerton for termination of traffic; (4) has failed to pay terminating access bills within thirty days of submission of the bill, in violation of Palmerton's intrastate switched access charge tariff on file with the Commission; (5) is operating as an access provider and/or an interexchange carrier (IXC) without certification by the Commission in violation of 66 Pa. C.S. § 1102(a); and (6) is violating its competitive local exchange carrier (CLEC) certificate from the Commission, by failing to maintain its financial and legal fitness.

Simultaneously with its Complaint, Palmerton filed a Petition for Interim Emergency Order (Petition), pursuant to 52 Pa. Code § 3.6, which requested that Global NAPs be required to provide adequate assurance of payment

ability or to pay all outstanding intrastate, interexchange access bills, pending final resolution of this proceeding.

By Opinion and Order entered May 5, 2009, we directed the presiding ALJ to schedule this matter for expedited consideration with the goal of completing the proceeding on Palmerton's Complaint within 120 days of the entry date of the Commission's Order.

On April 20, 2009, the ALJ issued an Order joining Verizon as an indispensable party in this case.

On May 18, 2009, the ALJ issued an Order Establishing Financial Security directing Global NAPs to provide documentation no later than May 28, 2009, demonstrating that Global NAPs had obtained a surety bond in favor of Palmerton in the amount of $246,108.20, pending a Final Order by the Commission in the underlying Complaint case.

On May 19, 2009, Global NAPs discontinued terminating traffic to Palmerton.

On May 26, 2009, the ALJ reduced the amount of the surety bond to $205,972.79 reflecting the fact that Global NAPs is no longer sending Voice over Internet Protocol (VoIP) traffic to Palmerton. However, Global NAPs subsequently failed to file the documentation required by the ALJ.

On May 29, 2009, Palmerton filed a Request for Sanctions against Global NAPs with the ALJ.

By Opinion and Order entered on June 5, 2009, the ALJ issued an Initial Decision Imposing Sanctions which ordered a civil penalty in the amount of $1,000 per day commencing on May 29, 2009, and accruing until such time as Global NAPs provides documentation to the Commission and to Palmerton demonstrating that Global NAPs has obtained a surety bond in favor of Palmerton in the amount of $205,972.79.

On June 10, 2009, Global NAPs filed Exceptions to the Initial Decision Imposing Sanctions, and on June 15, 2009, Palmerton filed Reply Exceptions.

On June 25, 2009, we denied Global NAPs' Exceptions and adopted the ALJ's Initial Decision Imposing Sanctions.

On July 9-10, 2009, hearings were held with respect to the substantive issues of the Complaint.

On July 20, 2009, Palmerton and Global NAPs each filed and served their Main Brief. Also on July 20, 2009, Verizon filed and served a letter stating that it would not be filing a Main Brief.

On July 27, 2009, Palmerton, Global NAPs and Verizon each filed and served their Reply Briefs.

On August 7, 2009, the ALJ issued his Initial Decision: (1) dismissing Palmerton's Complaint except as applicable to Global NAPs South, Inc.; (2) imposing a civil penalty of $750 on Global NAPs South, Inc. for three violations of the provisions of 52 Pa. Code § 63.36; (3) imposing a civil penalty of $1,000 per day commencing May 29, 2009, through and including the date of a

final Commission Order in this case; and (4) issuing a directive that Global NAPs South, Inc. cease and desist from further violations of the Pennsylvania Public Utility Code and of the regulations and orders of the Commission. The Initial Decision set forth sixty-four Findings of Fact and ninety Conclusions of Law.

As noted, on August 31, 2009, Palmerton and Global NAPs filed Exceptions to the Initial Decision. Verizon filed a letter stating that it would not be filing Exceptions.

On September 10, 2009, Palmerton, Global NAPs and Verizon each filed Reply Exceptions.

## III. Discussion

This Formal Complaint constitutes a case of first impression for this Commission. In sum, the Complaint concerns a dispute over intercarrier compensation involving the termination of certain calls by Palmerton where those calls have been indirectly transmitted to Palmerton by GNAPs. It is beyond doubt that a number of these calls are VoIP calls. Because of certain actions or inaction of the Federal Communications Commission (FCC) and certain decisions of federal appellate courts that relate to VoIP and Internet Protocol (IP) enabled services, there exists a certain degree of confusion in this proceeding regarding whether this Commission possesses and can exercise the appropriate subject matter jurisdiction to resolve this intercarrier compensation dispute. However, based on existing Pennsylvania and federal law, this Commission's subject matter jurisdiction can resolve this intercarrier compensation dispute.

## A. The Commission's Subject Matter Jurisdiction

### 1. Analytical Framework

ALJ Weismandel's analysis of whether this Commission possesses subject matter jurisdiction is predicated on the type of traffic delivered by GNAPs to Palmerton. ALJ Weismandel's ID states in relevant part:

> Complicating the question of subject matter jurisdiction in this case is the fact that *the key issue of dispute between the parties, the very nature of the telephone traffic delivered by Global NAPs to Palmerton, is determinative of the Commission's jurisdiction.* Palmerton's Complaint alleges that Global NAPs owes intrastate access charges pursuant to the Pennsylvania Telephone Association Access Service Tariff, PA P.U.C. Tariff No. 11. To state the obvious, if the telephone traffic is truly intrastate, and not otherwise excluded from the imposition of access charges or from Commission jurisdiction, then Palmerton has a meritorious claim. However, if the traffic is of a type over which the Commission's jurisdiction has been preempted or *is not a telecommunications service*, then Palmerton's claim for unpaid access charges is dependent upon Palmerton's ability to establish that the telephone traffic for which it billed Global NAPs is, in fact, intrastate telecommunications service not otherwise removed from the Commission's jurisdiction.

ID at 22-23 (emphasis added).

First, excluding any consideration of the interstate versus intrastate *jurisdictional* classification of the traffic at issue – a matter that is addressed below — we find that strict reliance on the traffic protocols for the related calls that are being transmitted by GNAPs and eventually terminate in Palmerton's network is not determinative of the Commission's subject matter jurisdiction both in terms of applicable Pennsylvania and federal law and sound policy. We find that strict reliance on these traffic protocols for these calls places the legal and technical

analysis in this matter on a legally unsustainable course. This approach also has the capacity of creating undesirable regulatory policy results. To use a simple analogy to the situation that the Commission faces in this proceeding, consider the following simplified hypothetical situation:

- The Commission regulates both the equipment and the transportation *services* of a truck company that conveys *mixed* merchandise which ends up at a transshipment terminal.

- The Commission exercises a certain degree of regulation over the access and the access fees for the use of the transshipment terminal facilities by the trucking company.

- Different fee schedules apply for the transshipment terminal access and handling of the mixed merchandise items carried by the trucking firm. The merchandise items that carry a discernible label identifying their origin as being within the Commonwealth are charged access fees prescribed by the Commission. Certain origin classifications may have further effects on these fees that are under the Commission's jurisdiction.

In this hypothetical situation, the Commission, the trucking firm, and the transshipment terminal operator are or should be totally indifferent as to the types of merchandise carried by the transport vehicles of the trucking firm. The Commission focuses on the common carrier transportation function and service of the trucking company, the access service provided by the transshipment facility that is open to all trucking common carriers, and the transshipment facility's access fees that involve merchandise items of intrastate origin. It goes without saying that the Commission would face an interesting situation – as it does in this proceeding – if the trucking firm asserts that it is able to access and drop off certain types of merchandise items at the transshipment facility (which is then obliged to appropriately handle them), but it is not obligated to pay any access or handling fees for certain "unique types" of merchandise items. The problem would become even more complex if the trucking firm were also to assert that the

Commission cannot address this situation because of the "unique type" of these merchandise items.

Assuming that the Commission was to somehow voluntarily abstain from addressing this situation, one would wonder what could be the incentive of the transshipment facility to accept and handle any and all of the merchandise items delivered to it by the trucking firm while potentially incurring a financial loss in the process. On the other hand, the Commission has the choice of more precisely focusing its analysis of the pertinent situation on the trucking firm's common carrier transportation service and the transshipment facility's access function. Under this analytical prism, the trucking firm still performs a common carrier transportation service no matter the type of merchandise that it conveys to the transshipment facility for final handling and, in the hypothetical situation, this activity is squarely within the Commission's subject matter jurisdiction.

### 2. GNAPs Provides Telecommunications Services and the Commission Has Subject Matter Jurisdiction

GNAPs' function of transmitting and then indirectly accessing and terminating traffic at Palmerton's network facilities is a common carrier telecommunications service, and the Commission has subject matter jurisdiction. GNAPs' fundamental telecommunications service function is not *altered* by the fact that GNAPs transports a "mix" of traffic including the "unique type" of VoIP calls. A large part of the evidentiary record in this proceeding has been consumed in an attempt to ascertain whether the Commission's subject matter jurisdiction is dependent upon the traffic protocols of the calls transported by GNAPs and indirectly terminated at Palmerton's facilities rather than on the overall transportation function that, in and of itself, legally and technically constitutes a common carrier telecommunications service *irrespective* of the technical protocol

classification of the traffic being carried. This telecommunications service is clearly provided by a common carrier telecommunications utility that has been duly certificated to operate as such by this Commission within specific areas of the Commonwealth.[1]

The overwhelming weight of both Pennsylvania and federal legal authority in this matter supports our legal conclusion that GNAPs is engaged in the provision of common carrier telecommunications service in transporting VoIP and other types of traffic calls that are not IP-based, e.g., conventional wireline voice call traffic transmitted under time division multiplexing or TDM, wireless calls, asynchronous transfer mode or ATM traffic, etc. We recognize that the technical fact that GNAPs accepts, handles, and transports traffic of various technical transmission protocols is well established.[2] The fact that GNAPs handles and transports IP-based traffic does not detract from the overall common carrier telecommunications service which GNAPs performs. Also, we rely on the fact that this Commission found in its landmark *Core* decision that the provision of common carrier access for information service providers (ISPs) constitutes

---

[1] GNAPs is a competitive local exchange carrier (CLEC) authorized to operate in the service areas of various incumbent local exchange carrier (ILEC) telephone companies. ID at 12. Although GNAPs is not authorized to operate in Palmerton's service area and does not have a direct interconnection agreement with Palmerton, GNAPs' transported call traffic indirectly terminates at Palmerton's facilities by transiting the network of Verizon Pennsylvania Inc. (Verizon PA), another ILEC. Verizon PA and GNAPs have an interconnection agreement. *Petition of Global NAPs South, Inc. For Arbitration pursuant to 47 U.S.C. §252(b) of Interconnection Rates, Terms and Conditions with Verizon Pennsylvania Inc.*, Docket No. A-310771F7000, Order entered April 21, 2003.

[2] GNAPs Witness Mazuret, Tr. 850, 925. For a technical description of the ATM and TDM types of traffic, see Harry Newton, *Newton's Telecom Dictionary*, 20th ed. (CMP Books, San Francisco, CA 2004), at 78 and 834.

"telephone exchange service" and, naturally, a telecommunications service. The Commission stated:

> We find the FCC's treatment of dial-up access to ISPs to be more consistent with the Core position. That is ISPs themselves, are treated as end users of telecommunications services, while the underlying service they provide to ISP subscribers, Internet access, is information.[3]

In affirming the Commission's *Core* decision, the Commonwealth Court relied on applicable federal law, stating:

> The FCC Pole Attachment Decisions hold that the offering of *transmission path service on a non-discriminatory basis to the public by a common carrier is telecommunications service*. The FCC Pole Attachment Decisions confirm that internet service is an information service, but that the *transmission path* needed to provide that internet service *is a telecommunications service if the transmission path service is offered to the public by a common carrier*. Thus, the Commission was correct in determining that transmission path service is a telecommunications service *under state and federal law.*

---

[3] This observation is not to suggest a particular position on the "one-call" versus "two calls" debate associated with ISP-bound compensation litigation. *Application of Core Communications, Inc. for Authority to amend its existing Certificate of Public Convenience and necessity and to expand Core's Pennsylvania operations to include the Provision of competitive residential and business Local exchange telecommunications services throughout the Commonwealth of Pennsylvania, et al.*, Docket Nos. A-310922F0002AmA, A-3100922F0002AmB, (Order entered December 4, 2006) at 26, *aff'd Rural Tel. Co. Coalition v. Pa. Pub. Util. Comm'n*, 941 A.2d 751 (Pa. Cmwlth. 2008) (*Core Appeal Decision*).

*Core Appeal Decision*, 941 A.2d at 758 (emphasis added).[4]

We also reached a similar conclusion when this Commission certificated Sprint Communications Company L.P. as a CLEC provider of wholesale telecommunications "platform" services. Our *Sprint* Order noted with approval Sprint's position that the "mere fact that Sprint uses Internet Protocol – a particular technology adopted by most of the cable industry for placing voice traffic onto a hybrid fiber coax network – does not render Sprint's service an internet service."[5] The Commission's *Core* and *Sprint* decisions were paralleled by the federal *Time Warner* declaratory ruling that was issued by the FCC in March 2007. The FCC stated:

> 9. Consistent with Commission precedent, we find that the Act [federal Communications Act of 1934, as amended] does not differentiate between the provision of telecommunications services on a wholesale or retail basis for the purposes of sections 251(a) and (b), and we confirm that providers of wholesale telecommunications services enjoy the same rights as any "telecommunications carrier"

---

[4] The Commonwealth Court relied on the following FCC decisions: *In the matter of Fiber Technology Networks, L.L.C. v. North Pittsburgh Telephone Company*, FCC File No. EB-05-MD-014, 22 FCC Rcd 3392, 2007 FCC LEXIS 1593 (February 23, 2007); *In the matter of DQE Communications Network Services, LLC v. North Pittsburgh Telephone Company*, FCC File No. EB-05-MD-027, 22 FCC Rcd 2112, 2007 FCC LEXIS 1066 (February 2, 2007) (collectively, FCC Pole Attachment Decisions).

[5] *Application of Sprint Communications Company L.P. For Approval of the Right to Offer, Render, Furnish or Supply Telecommunications Services as a Competitive Local Exchange Carrier to the Public in the Service Territories of Alltel Pennsylvania, Inc., Commonwealth Telephone Company and Palmerton Telephone Company*, Docket Nos. A-310183F0002AMA, A-310183F0002AMB, A-310183F0002AMC, (Order entered December 1, 2006) at 36.

under these provisions of the Act.[6] We further conclude that the statutory classification of the end-user service, *and the classification of VoIP specifically, is not dispositive of the wholesale carrier's rights under section 251.*

10. The Act defines "telecommunications" to mean "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." [47 U.S.C. § 153(43)] The Act defines "telecommunications service" to mean "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." [47 U.S.C. § 153(46)] Finally, any provider of telecommunications services is a "telecommunications carrier" by definition under the Act. [47 U.S.C. § 153 (44)]

The FCC went on to state the following on how its *Time Warner* ruling relates to intercarrier compensation issues:

17. Certain commenters ask us to reach other issues, including the application of section 251(b)(5) and the classification of VoIP services. [*See, e.g.,* Qwest Comments at 6 ("The Nebraska position is obviously dependent on how the Commission ultimately classifies

---

[6] To resolve the confusion over the meaning of "wholesale," we affirm the longstanding Commission [FCC] usage of a wholesale transaction of a service or product as an input to a further sale to an end user, in contrast to a retail transaction for the customer's own personal use or consumption. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Second Report and Order, 14 FCC Rcd 19237, 19423, ¶ 13 (1999) ("Black's Law Dictionary defines retail as '[a] sale for final consumption in contrast to a sale for further sale or processing (*i.e.*, wholesale) ... to the ultimate consumer") (quoting Black's Law Dictionary 1315 (6th ed. 1990)). *In re Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55 (FCC March 1, 2007), Memorandum Opinion and Order, DA-07-709, *slip op.*, ¶¶ 9-10, at 5 (emphasis added) (*Time Warner* FCC decision). *See also* Palmerton Exc. at 26.

> VoIP service").] We do not find it appropriate or necessary here to resolve the complex issues surrounding the interpretation of Title II more generally or the subsections of section 251 more specifically that the Commission is currently addressing elsewhere on more comprehensive records. [*See, e.g., Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, CC Docket No. 01-92, 20 FCC Rcd 4685 (2005).] For example, the question concerning the proper statutory classification of VoIP remains pending in the *IP-Enabled Services* docket. [*IP-Enabled Services*, 20 FCC Rcd at 10245. Similarly, we disagree with the assertions that it is necessary to complete the proceedings pending in the IP-enabled services, intercarrier compensation, and universal service dockets in order to take action on or instead of taking action on this Petition. *See, e.g.*, NTCA Reply Comments at 5-6.] Moreover, in this declaratory ruling proceeding we do not find it appropriate to revisit any state commission's evidentiary assessment of whether an entity demonstrated that it held itself out to the public sufficiently to be deemed a common carrier under well-established case law. In the particular wholesale/retail provider relationship described by Time Warner in the instant petition, the wholesale telecommunications carriers have assumed responsibility for compensating the incumbent LEC for the termination of traffic under a section 251 arrangement between those two parties. We make such an arrangement an explicit condition to the section 251 rights provided herein. [*See, e.g.*, Verizon Comments at 2 (stating that one of the wholesale services it provides to Time Warner Cable is "administration, payment, and collection of intercarrier compensation, including exchange access and reciprocal compensation"); Sprint Nextel Comments at 5 (offering to provide for its wholesale customers "intercarrier compensation, including exchange access and reciprocal compensation").] We do not, however, prejudge the Commission's determination of what compensation is appropriate, or any other issues pending in the *Intercarrier Compensation* docket.

*Time Warner* FCC Decision, ¶ 17, at 11. *See also* Palmerton Exc. at 26.

The FCC Pole Attachment Decisions that were cited by the Commonwealth Court also confirm that there are no material differences between Pennsylvania and federal law in determining whether entities that have been

certificated by this Commission as competitive telecommunications carriers indeed provide *common carrier telecommunications services.*[7] In short, we determine that GNAPs is a telecommunications common carrier providing telecommunications services in Pennsylvania.

The next area of focus must be whether the Commission has subject matter jurisdiction over the present intercarrier compensation dispute.

The overwhelming majority of available legal authority clearly indicates that both state utility regulatory commissions and various courts have adjudicated intercarrier compensation disputes involving GNAPs in a number of jurisdictions. The related adjudications took place even though these intercarrier compensation disputes involved the common carrier exchange of VoIP traffic between GNAPs and other telecommunications service providers. These state utility regulatory commissions and courts conducted these adjudications by asserting the appropriate subject matter jurisdiction over these intercarrier compensation disputes. The fact that the underlying traffic exchanged between GNAPs and other telecommunications carriers was of the VoIP type did not prove to be determinative of subject matter jurisdiction for these regulatory bodies and courts, nor did it become an insurmountable legal barrier. Similarly, the fact that the FCC has not yet made definitive pronouncements in its long pending but still unresolved proceedings relating to intercarrier compensation and the proper classification of IP-based services, including VoIP, did not detract from the adjudication of intercarrier compensation disputes involving GNAPs by a majority of state utility regulatory commissions and courts of proper jurisdiction.

---

[7] *In re Fiber Technologies Networks, L.L.C. v. North Pittsburgh Telephone Company*, File No. EB-05-MD-014 (FCC Rel. February 23, 2007), DA-07-486, *slip op.*, ¶¶ 11-16, at 5-7; *In re DQE Communications Network Services, LLC v. North Pittsburgh Telephone Company*, File No. EB-05-MD-027 (FCC Rel. February 2, 2007), DA-07-472, *slip op.*, ¶¶ 11-13, at 5-6.

A relevant decision of the United States District Court for the Eastern District of New York observed the following while deciding opposing motions for partial summary judgment and dismissal:

> There are several fatal flaws in Global's [GNAPs'] argument. First and foremost, it is not essential to determine what the entire regulatory regime for VoIP traffic should be in order to determine the dispute pending before the Court. Critically, as is currently the case regarding traditional reciprocal compensation, even if the FCC had made such a determination, the parties would have been free to opt out of any such regulatory regime by a mutual nondiscriminatory, arms length agreement. *See Iowa Utilities Bd.*, 525 U.S. at 372-73, 119 S.Ct. 721; *Verizon Maryland, Inc. v. Public Service Comm'n of Maryland*, 535 U.S. 635, 638-39, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002)
>
> Shotgun wedding notwithstanding, the parties [Verizon New York Inc. and GNAPs] have developed a complex technical and contract-based infrastructure of long standing to deliver for their customers a variety of telecommunications services. VoIP traffic delivery is certainly one of them; in fact Global acknowledges that the lion's share of the traffic covered by the [interconnection] agreements now before the Court was VoIP traffic *when the agreements were executed*. *See* Masuret Aff. at ¶ 6. Neither side was waiting for the FCC to decide VoIP's regulatory regime when they made their bargain. And, what is in issue here is the bargain. Who pays for what *as agreed*.
>
> Ultimately, Verizon is correct: at its essence the dispute is a billing dispute. There is no reason to wait for Godot or the adoption of a regulatory scheme for VoIP traffic by the FCC. The determination of disputed contractual obligations is well within the conventional experience of the district court.
>
> This point dovetails well in applying the second and fourth prong of the test. Although the FCC is quite appropriately concerned with creating a uniform scheme to regulate VoIP traffic going forward, when the parties brought to the FCC their contractual dispute arising out of the VoIP traffic that they were actually handing off to each

> other every day, Cmplt. at ¶ 36, the FCC took a pass and sent them packing. *See* Ingram Aff. in Opposition to Motion to Dismiss at 4-5, 13. It was a response that is most instructive. Obviously the FCC had to be well aware of the existence of substantial VoIP traffic in the telecommunications marketplace otherwise it would not be pondering overall regulation. Equally obvious, the FCC had to be aware also that the existing VoIP traffic was moving at someone's expense. The fact that neither on the complaint of Global nor in any other proceeding referred to us by the parties has the FCC deemed it necessary to intervene to upset compensation schemes involving such traffic agreed to by the carriers, *see, e.g., In re Vonage Holding Corp.*, 19 F.C.C.R. at 22,404, leads to the inescapable conclusion that the FCC is in the interim deferring to the existing intercarrier agreements as controlling such billing issues and has left for courts or arbitration to resolve any contractual disputes about VoIP traffic arising out of them.

*Verizon New York Inc. v. Global NAPS, Inc.*, 463 F.Supp.2d 330, 342 (E.D.N.Y. 2006), 2006 U.S. Dist. LEXIS 87085 (emphasis in original).[8] *See also* Palmerton MB at 39, Palmerton Exc. at 28.

In an interconnection agreement dispute involving GNAPs and Verizon New England, the U.S. Court of Appeals for the First Circuit sustained the initial findings *and jurisdiction* of the Massachusetts Department of Telecommunications and Energy (Mass. DTE). The First Circuit Court established that the Mass. DTE was not preempted by the FCC's *ISP Remand Order*[9] on deciding an interconnection agreement dispute even when it related to

---

[8] The same court observed that: "To state the obvious, cost does attach to the provision of these [access] services" for the completion of interexchange calls. 463 F.Supp.2d at 334.

[9] *Local Competition Provisions In the Telecommunications Act of 1996 (ISP Remand Order)*, 16 FCC Rcd. 9151 (2001), 2001 WL 455869.

information or ISP bound traffic between GNAPs and Verizon New England.[10] The First Circuit Court stated:

> Global NAPs' argument ignores an important distinction. The FCC has consistently maintained a distinction between local and "interexchange" calling and the intercarrier compensation regimes that apply to them, and reaffirmed that states have authority over intrastate access charge regimes. Against the FCC's policy of recognizing such a distinction, a clearer showing is required that the FCC preempted state regulation of both access charges and reciprocal compensation for ISP-bound traffic.

*Global NAPs Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 73 (1st Cir. 2006). *See also* Palmerton MB at 41, Palmerton Exc. at 24.

An intercarrier compensation dispute between GNAPs and certain rural ILECs that are subsidiaries of the Telephone and Data Systems Inc. (TDS) holding company in the State of New Hampshire presents strong parallels with the case before us. The November 10, 2009 ruling of the New Hampshire Public Utilities Commission (NH PUC) is relevant here. The NH PUC observed the following in its decision:

> TDS [four TDS ILECs] complains that Global NAPs is accessing TDS' local exchange network to terminate long distance toll calls to end-user customers located in TDS service areas without paying applicable charges. Nine other carriers [ILECs] intervened in this proceeding with similar concerns. Global NAPs argues that the calls it transmits via TDS's network are not subject to charges of any kind because they are Enhanced Service Provider (ESP) calls exempted by the FCC from access charges. Global NAPs is not itself an ESP,

---

[10] *Global NAPs Inc. v. Verizon New England, Inc.*, 444 F.3d 59 (1st Cir. 2006). The present reference to this court case that affirmed the Mass. DTE intercarrier compensation treatment for VNXX ISP-bound calls is not dispositive of the same issue in other proceedings that are still pending before this Commission. Palmerton MB at 41-42 n. 99.

> however, rather, it provides *call transport services* to ESPs, who, in turn, provide call initiation and reception services to end users. To resolve this dispute, we must consider the legal framework pertaining to network access, the nature of Global NAPs traffic, and the applicable burden of proof.

*Hollis Telephone, Inc., Kearsarge Telephone Co., Merrimack County Tel. Co., and Wilton Telephone Co.*, DT 08-28, Order No. 25,043 (NH PUC November 10, 2009) NH PUC Order at 14 (footnotes omitted, emphasis added).

In that case, the NH PUC established the following points regarding the applicable legal framework and its jurisdiction:

- ILECs *must interconnect directly or indirectly* with the facilities and equipment of other telecommunications providers per Section 251(a) of TA-96, 47 U.S.C. § 251(a), and the U.S. Congress was clear in its expectation that local exchange carriers (LECs) would be compensated for *access to* and *use of their network facilities by other carriers*. NH PUC Order at 15 (citing 47 U.S.C. § 252(d) (establishing pricing standards for the provision of interconnection and network element charges)).

- The FCC has confirmed that any carrier that wishes to avail itself of an ILEC's network must pay for that privilege. Without such payment, the added cost to the ILEC of transporting and terminating the traffic is borne fully by the incumbent. NH PUC Order at 15.

- Rates, terms and conditions of access are generally established through interconnection agreements or interstate and intrastate access tariffs which govern interstate and intrastate traffic originating or terminating on a carrier's local exchange network. NH PUC Order at 15 (citing 47 U.S.C. § 251(c) (interconnection agreements); 47 U.S.C. § 252(f) (statements of generally available terms)).

- Interstate telecommunications traffic falls under the jurisdiction of the FCC. ILECs generally provide exchange access to their networks through interconnection agreements negotiated under Section 251 of TA-96. Such agreements often specify that interstate and intrastate exchange access shall be governed by applicable tariffs. The applicable interstate exchange access tariff for the TDS ILECs is filed by the National Exchange Carrier

Association (NECA) with the FCC, and such tariffs establish the applicable rates for terminating interstate switched access services to exchanges served by the TDS ILECs in New Hampshire. NH PUC Order at 15-16.

- The FCC has reaffirmed that states have authority over intrastate access charge regimes, and that intrastate telecommunications traffic in New Hampshire is governed by intrastate access tariffs and subject to the jurisdiction of the NH PUC. *Id.* at 16 (citing *Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 63, 73 (1st Cir. 2006)). It is well settled that tariffs filed with the NH PUC have the force and effect of law, and each of the TDS ILECs has filed an intrastate exchange access tariff with the NH PUC. These intrastate access tariffs establish the applicable rates for terminating intrastate switched access services to exchanges served by these companies. NH PUC Order at 17.

The NH PUC was not persuaded by GNAPs' reliance on the FCC's *Vonage* decision and argument that all of the traffic at issue is interstate and therefore not subject to the NH PUC's intrastate jurisdiction.[11] The NH PUC decided otherwise:

> Global NAPs argues that the traffic at issue in this proceeding is interstate and, therefore, not subject to the jurisdiction of this Commission. To reach that conclusion, Global NAPs argues that the calls are Internet Protocol (IP)-enabled and cannot be distinguished as intrastate versus interstate traffic; as a result, they must all be considered interstate. Global NAPs cites certain decisions of the FCC and other state commissions to support its argument. We have reviewed the cited cases and find none to be dispositive with respect to the traffic at issue here.

NH PUC Order at 17.

> In the *Vonage* decision, the FCC preempts states from imposing market entry requirements such as certification, tariffing and related requirements on Vonage's interstate IP-enabled services as

---

[11] *In re Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211 (FCC Rel. November 12, 2004), Memorandum Opinion and Order, FCC 04-267, 19 FCC Rcd. 22,404 (2004) (FCC *Vonage* decision), *aff'd*, *Minnesota Pub. Util. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

> conditions to offering such services within a state. *Vonage* at ¶ 46... Underlying the FCC's decision is the recognition of the impracticability of separating intrastate from interstate calls in an IP-enabled system, such as that used by Vonage. *Id.* at ¶¶ 31-31 [*sic*]. The FCC noted that "state regulation violates the Commerce Clause if the burden imposed on interstate commerce by state regulation would be 'clearly excessive in relation to the putative local benefits.'" *Vonage* at 38.

NH PUC Order at 18.

> *Payment for services rendered, however, cannot be construed as an excessive regulatory burden.* Here TDS is not proposing that this Commission impose new regulations on Global NAPs that could pose a potential barrier to market entry – it *is seeking enforcement of its existing intrastate tariff.* Timely payment for services rendered under valid tariffs should be a uniform policy across all states. Non-payment *is an unjust burden for New Hampshire's local exchange carriers, and can create unfair market competition where other carriers are paying for those same services.*

NH PUC Order at 18-19 (emphasis added).[12]

The NH PUC was not persuaded by the decision of the New York Public Service Commission (NY PSC) in an intercarrier compensation dispute involving GNAPs and TVC Albany d/b/a Tech Valley Communications, an

---

[12] We note that the intrastate carrier access charges of Palmerton and other rural ILECs operating in Pennsylvania are currently the subject of a consolidated Commission Investigation at *Investigation regarding intrastate Access charges and IntraLATA Toll Rates of Rural Carriers and the Pennsylvania Universal Service Fund*, Docket No. I-00040105, and the Formal Complaints of *AT&T Communications of Pennsylvania, LLC, et al. v. Armstrong Telephone Company-Pennsylvania, et al.* Docket Nos. C-2009-2098380, *et al.*

ILEC,[13] where the NY PSC directed the adversary parties to enter into private contract negotiations on the rates, charges, terms and conditions for the exchange of nomadic VoIP traffic. NH PUC Order at 19 (citing NY PSC *TVC* decision at 16-17). The NH PUC points out, however, that the NY PSC *TVC* decision acknowledged that "[a]ny telecommunications carrier that delivers traffic over the public switched telephone network for another carrier can reasonably expect to be compensated irrespective of whether the traffic originates on the PSTN [public switched telephone network], on an IP network, or on a cable network." NH PUC Order at 19 (citing NY PSC *TVC* at 15).

Further, the NH PUC noted with approval that a California Public Utilities Commission decision requiring GNAPs to pay access charges "took into account the fact that the FCC expressed a general policy view that services that terminate on the PSTN, such as those offered by GNAPs, should not be exempt from access or similar charges." NH PUC Order at 19 [citing *California PUC GNAPs Decision Denying Rehearing,* slip op. 2009 WL 254838 (Cal. P.U.C.) at 10 (citing FCC Order *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges* (2004) 19 F.C.C.R. 7457, 7464-65, ¶ 15)].

The NH PUC found that:

> Global NAPs focuses on the interstate versus the intrastate issue underlying each decision to conclude more broadly that because some of its calls are an IP-enabled service, it is impossible to distinguish intrastate from interstate and, therefore, jurisdiction over all its traffic defaults to the FCC. In so doing, Global NAPs evades

---

[13] *Complaint of TVC Albany, Inc. d/b/a Tech Valley Communications Against Global NAPs, Inc. for Failure to Pay Intrastate Access Charges*, Case No. 07-C-0059 (NY PSC March 20, 2008) (NY PSC *TVC v. GNAPs* decision). *See also* GNAPs MB Appendix and GNAPs Reply Exc. at 4.

the more fundamental concern that it has failed to pay anything for access to TDS facilities and services, whether the traffic at issue is interstate or intrastate.

*Id.* at 19-20.

The NH PUC concluded the following when dealing with the nature of the traffic at issue:

- The TDS ILECs pointed out that there is nothing in the call detail records to distinguish "regular" voice traffic from ESP or any other IP-enabled traffic. The TDS companies further argued that the data collected for the calls transmitted by Global NAPs and carried over the TDS's network bear all the hallmarks of traditional voice traffic that is subject to access charges covered by access tariffs. NH PUC Order at 21-22.

- GNAPs admitted that it does not know the original format of the calls it receives from its ESP customers for transport, nor does GNAPs distinguish the format of the traffic it receives, whether time division multiplexing (TDM), asynchronous transfer mode (ATM), or IP. Further, Global NAPs converts all traffic to ATM for transport on its network and then converts the traffic to TDM for termination on the public switched network. NH PUC Order at 22 (citations omitted). GNAPs also conceded that at least some, if not most or all, of its traffic is likely intrastate. NH PUC Order at 22 [citing *Global NAPs Brief* at 4 ("This classification of traffic as 'nomadic' is important because it indicates the extremely high probability that *not all* of the traffic terminated by Global to FairPoint is sent and received entirely within New Hampshire." (emphasis added by NH PUC))]. Despite this acknowledgment that some, if not all, traffic delivered by Global NAPs to FairPoint for termination to a TDS end-user is sent and received entirely within New Hampshire, Global NAPs has not paid any access charges, whether intrastate or interstate, to TDS. NH PUC Order at 23.

- GNAPs failed to produce any evidence to substantiate its claims that the calls carried over the TDS ILECs' networks are ESP traffic and exempt from access charges. GNAPs offered nothing beyond the generic, boilerplate language its customers adopt by signing service contracts with GNAPs. Even if, *arguendo*, all GNAPs traffic delivered to TDS facilities were determined to be interstate, GNAPs remains obligated to pay for its

access to TDS's network under TDS's interstate tariff. However, GNAPs has paid nothing for the use of TDS's network. NH PUC Order at 23.

The NH PUC reached the following decision in the GNAPs intercarrier compensation dispute with the TDS ILECs:

> Based on our review of the record and the arguments presented by the parties, we conclude that Global NAPs has failed to prove its assertion that its traffic is exempt from access charges. In the meantime, unpaid charges for access to TDS facilities continue to accrue at the rate of nearly $25,000 per month, totaling $410,613.12 as of January 1, 2009. *TDS Letter* dated January 20, 2009. If Global NAPs does not pay for access to TDS's network – access that is essential for the provision of service to its customers communicating with customers located in TDS's service territory, those costs must be absorbed by TDS. *Such a result is untenable where the law is clear that carriers must compensate for such access.* Therefore, we find that, absent payment in full of outstanding invoices or a mutually acceptable payment arrangement between Global NAPs and TDS, TDS *is entitled to disconnect service* to Global NAPs, in accordance with the conditions set forth below.

NH PUC Order at 24-25 (emphasis added).

The Georgia Public Service Commission (GA PSC) reached a generally similar conclusion in an intercarrier compensation dispute between GNAPs and a number of ILECs in the State of Georgia:

> In concluding that the Commission would not be preempted *even if the subject traffic was ESP or ISP traffic*, the Hearing Officer relied upon the FCC's Time Warner Decision. In that case, the FCC found that the wholesale telecommunications carriers assumed the responsibility for compensating the incumbent LEC for the termination of traffic under a section 251 arrangement between the parties. (Time Warner Decision, 17). GNAPs argued that the Commission should not rely on the Time Warner Decision because it involved a section 251 agreement as opposed to the tariff arrangement in this case. (Memorandum, p. 14). However, GNAPs

did not explain why this distinction *alters the principle that it should not have a "free ride" on the system.* The Commission concludes that, under the terms of the applicable tariff, access charges are due for termination of the subject traffic to the PSTN.

* * *

GNAPs relied on the [FCC] Vonage Decision in support of its position that the Commission is preempted from assessing access charges. However, GNAPs has not established that the service it offers is the same as the service at issue in the Vonage Decision. In addition, in the Vonage Decision, the FCC preempted state regulations that pertained to operating authority, the filing of tariffs and the provisioning and funding of 911 services. (Vonage Decision, ¶ 10). At issue in this case are regulations regarding the payment of intrastate access charges for calls that terminate on the PSTN. The FCC has not preempted states regarding this issue. Should Congress or the FCC take additional action on the extent to which states are preempted in this area, the Commission may re-examine the preemption issue at that time. The Commission's decision is based on the specific facts of this case.

*Request for Expedited Declaratory Ruling as to the Applicability of the Intrastate Access Tariffs of Blue Ridge Telephone Company, Citizens Telephone Company, Plant Telephone Company, and Waverly Hall Telephone LLC to the Traffic Delivered to Them by Global NAPs, Inc.*, Docket No. 21905 (GA PSC July 29, 2009), Order Adopting in Part and Modifying in Part the Hearing Officer's Initial Decision, Document No. 121910, GA PSC Order at 8-9 (emphasis added). *See also* Palmerton Exc. at 29-30.

### 3. Commission Jurisdiction and the Interaction of Pennsylvania and Federal Law

The overwhelming weight of legal authority of Pennsylvania and federal law, as well as the relevant decisions of other state utility regulatory commissions and courts of appropriate jurisdictions that have dealt with a large number of intercarrier compensation disputes involving GNAPs, leads to the

inescapable conclusion that the FCC *Vonage* decision is not relevant or material on matters pertaining to the intercarrier compensation dispute before us. We believe that the NH PUC Order – and other similar decisions – that the FCC *Vonage* decision primarily affects the potential state role on market entry and regulation of nomadic VoIP service providers – is correct. NH PUC Order at 17-19. Here, as in many other jurisdictions, we are not dealing with the issue of market entry and regulation of nomadic VoIP service providers. Instead, we are dealing with the issue of GNAPs, a telecommunications utility carrier, which transports and terminates traffic at Palmerton's PSTN facilities. As in the case of the TDS ILECs in New Hampshire, Palmerton indirectly receives and terminates traffic that has been transported by GNAPs via the Verizon PA tandem switch on Market Street, Philadelphia, Pa. Tr. 667-668, GNAPs Exh. 6.

The FCC *Vonage* decision plainly does not, nor was it intended to, address the issue of whether intercarrier compensation applies for the use of Palmerton's PSTN facilities when terminating VoIP calls. Costs indeed attach to the termination of *any type of traffic* that Palmerton receives, and such costs do not "magically disappear" when the traffic includes VoIP calls whether those are of the nomadic or fixed type. Under the existing and so far unaltered premises of both Pennsylvania and federal law, the Commission determines that Palmerton is entitled to compensation for the traffic that it terminates at its facilities.

Furthermore, indirect transmission of such traffic by GNAPs to Palmerton constitutes a common carrier telecommunications service that falls squarely within this Commission's jurisdiction under applicable Pennsylvania and federal law. Pennsylvania's Voice-Over-Internet Protocol Freedom Act, P.L. 627 of 2008, codified at 73 P.S. § 2251.1 *et seq.*, established the Commission's jurisdictional boundaries over VoIP or IP-enabled services. 73 P.S. § 2251.4. The Act clearly provides that the Commission retains jurisdiction over "[s]witched

network access rates or other intercarrier compensation rates for interexchange services provided by a local exchange telecommunications company." 73 P.S. § 2251.6(1)(iv). And it is the question of "switched network access" that is at issue here for the Palmerton PSTN facilities and the GNAPs traffic that these facilities terminate. *See also* 66 Pa. C.S. § 3017 ("Refusal to pay access charges prohibited. — No person or entity may refuse to pay tariffed access charges for interexchange services provided by a local exchange telecommunications company.").

This Commission has also adjudicated a number of intercarrier compensation disputes under the premises of applicable Pennsylvania and federal law whether such cases involved the interpretation and enforcement of intrastate carrier access tariffs and/or interconnection agreements. In a similar vein, we do not need and cannot afford to wait and speculate whether the FCC will reach some sort of coherent and sustainable conclusion to its IP-enabled services and intercarrier compensation reform proceedings, when this might happen, and what the FCC's conclusions might be.

This Commission is not preempted by the FCC in addressing the intercarrier compensation issues at hand. Furthermore, GNAPs' contention that the FCC somehow "has clearly and repeatedly stated its intention" to preempt state regulatory jurisdiction over intercarrier compensation matters for "all VoIP and enhanced traffic"[14] is without basis in law or fact. That assertion flies in the face

---

[14] *See*, GNAPs Reply Exc. at 14 ("While the FCC has not yet specified the compensation rates for terminating VoIP traffic, it has clearly and repeatedly stated both its intention to do so and its preemption of state traffic regulation of all VoIP and enhanced traffic so that piecemeal resolution of this issue at the state level is prevented." (citing FCC *Vonage* decision)).

of federal appellate and district court decisions that have addressed intercarrier compensation disputes involving GNAPs itself.

Both the Initial Decision and GNAPs refer to the refusal of the federal courts to permit the collection of state universal service fund (USF) intrastate assessment surcharges by a nomadic VoIP provider in accordance with pertinent directives of the Nebraska Public Service Commission (NE PSC) for the broad proposition that "nomadic interconnected VoIP service has been preempted from state regulation by the FCC."[15] The "jurisdictional mix" issue of the telecommunications traffic that is carried by GNAPs and terminated at the Palmerton PSTN facilities is addressed below.

The federal court decisions are not applicable on the issue of subject matter jurisdiction in the case before us. First, we are not dealing here with the retail services of an interconnected albeit nomadic VoIP service provider. Neither are we trying to apply regulation that would have had the potential of touching the intrastate retail operations of an interconnected nomadic VoIP provider such as Vonage, e.g., through (hypothetically) Pennsylvania USF contribution assessments on Vonage's intrastate *retail* operations under our Pa. USF regulations at 52 Pa. Code § 63.161 *et seq.* Instead, we are dealing with GNAPs' *wholesale transport (inclusive of VoIP or IP-enabled calls), access to and termination of traffic in* Palmerton's PSTN network facilities, and these are clearly telecommunications functions and services under the Commission's jurisdiction in accordance with

---

[15] ID at 29 (citing *Vonage Holdings Corp. v. Nebraska Pub. Serv. Comm'n*, 564 F.3d 900 (8th Cir. 2009)). *See also* GNAPs MB at 9, GNAPs Reply Exc. at 13 (citing the underlying case, *Vonage Holdings v. Nebraska PUC [sic]*, 4:07 CV 3277 (D. Neb. 2008) at 9 ("there is no way to distinguish between interstate and intrastate Digital/Voice service; nor does the adoption of [FCC] safe-harbor rules affect the characterization of VoIP service as an information service") (*Vonage v. NE PSC* decisions)).

applicable Pennsylvania and federal law. Second, the practical effects of the *Vonage v. NE PSC* federal court decisions still remain unsettled and are currently pending before the FCC.[16] Finally, this Commission is technically well equipped and legally entitled to address the issues of jurisdictional traffic allocation in disputes involving intercarrier compensation for the provision of wholesale telecommunications carrier access services. Such a determination is essential in determining the type and appropriate level of intercarrier compensation for the various jurisdictional classifications of traffic that terminates at Palmerton's PSTN facilities. Again, in contrast to the *Vonage v. NE PSC* federal court decisions, this Commission is not dealing here with jurisdictional traffic allocations that relate to the retail operations, services, and revenues of a nomadic VoIP provider.

GNAPs' reliance on the NY PSC *TVC v. GNAPs* decision is equally misplaced and unpersuasive for both legal and operative reasons.[17] The NY PSC *TVC v. GNAPs* decision revolves around the unfounded legal theory that the FCC's *Vonage* decision has preemptive effects over the jurisdiction of a state utility regulatory commission to reach the actual merits of an intercarrier compensation dispute between two telecommunications carriers that involves the transport and termination of traffic that includes VoIP or IP-enabled calls "irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network." NY PSC *TVC v. GNAPs* decision at 15. Not surprisingly,

---

16 *See generally, Petition of the Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues,* FCC WC Docket No. 06-122, filed July 16, 2009; NE PSC and Kansas Corp. Comm'n *Ex Parte*, FCC WC Docket No. 06-122, filed December 30, 2009. *See also* Palmerton Exc. at 27 and n. 98.

17 GNAPs MB Appendix, GNAPs Reply Exc. at 4.

the NH PUC considered but declined to utilize both the rationale and the end result of the NY PSC *TVC v. GNAPs* decision.

From a legal and practical perspective, if this Commission were to follow the ruling of the NY PSC, it could not timely and conclusively resolve the present intercarrier compensation dispute in violation of applicable Pennsylvania and federal law; and such reliance would most likely prolong totally unnecessary and wasteful litigation by replacing the present Formal Complaint case with an equally contentious interconnection arbitration on exactly the same material intercarrier compensation issues.[18] The course of action taken by the NH PUC and the clear majority of state utility regulatory commissions and courts of competent jurisdiction in intercarrier compensation disputes involving GNAPs is the only clear and lawful choice for this Commission.

### 4. The Commission's Intrastate Jurisdiction, Access Charges, and the Presence of IP-Enabled Traffic

The majority of Pennsylvania and federal legal authority that has already been discussed points to the inescapable conclusion that the Commission has the appropriate subject matter jurisdiction over Palmerton's Formal Complaint. The next issue is whether this Commission's intrastate subject matter jurisdiction and the proper and lawful application of intrastate carrier access charges are somehow altered or nullified because of the presence of the allegedly "unique" VoIP or IP-enabled calls in the traffic that is transported by GNAPs and indirectly terminated at Palmerton's PSTN facilities.

---

[18] Although reportedly TVC Albany and GNAPs appear to have agreed to the NY PSC directives, it is unclear whether the case has reached administrative finality before the NY PSC where it has been in adjudication since January 12, 2007. NY PSC *TVC v. GNAPs* decision at 1.

The answer can be readily found in the evidentiary record that amply and credibly documents the routine application of Palmerton's intrastate carrier access tariff to intrastate interexchange traffic containing VoIP or IP-enabled calls *irrespective* of their final communication protocol conversion in their transport and final termination by Palmerton. This routine application of Palmerton's intrastate carrier access tariffs on the appropriate traffic has resulted in a corresponding absence of intercarrier compensation disputes in the ordinary and established course of intercarrier compensation business dealings.

For example, cable companies such as Adelphia, Comcast, and RCN *originate* fixed VoIP or IP-enabled wireline interexchange calls that terminate at Palmerton's PSTN's facilities. When Palmerton directly bills these companies under its intrastate carrier access tariff for the termination of these intrastate interexchange calls to its facilities, Palmerton receives the appropriate amount of intercarrier compensation irrespective of whether these fixed VoIP or IP-enabled originated wireline calls have been converted to a TDM protocol prior to their final termination at Palmerton's PSTN facilities. Tr. 519-520. *See also* Palmerton Exh. 12 at 27-28 (Comcast Deposition), and Palmerton Exc. at 30-31.[19]

The same also happens with the fixed VoIP or IP-enabled intrastate interexchange wireline calls that Palmerton terminates from its own affiliate Blue Ridge Digital Phone, a cable company, where such calls first transit through Sprint's common carrier telecommunications network prior to reaching Palmerton's PSTN. Sprint pays Palmerton the appropriate intrastate intercarrier compensation. Tr. 518-519, 536. Further, other companies, such as Service

---

[19] Certain of these cable companies also have telecommunications service operations that have been certificated as competitive local exchange carriers (CLECs) by the Commission. *See* Palmerton Exh. 7.

Electric, that also engage in the common carrier telecommunications transit transport of intrastate interexchange VoIP or IP-enabled originating wireline traffic behave in a similar and ordinary fashion. Tr. 631-633, 636.[20] (The more unique aspects of intercarrier compensation that apply on intrastate interexchange wireless calls terminating at the PSTN facilities of an ILEC such as Palmerton are addressed below.)

At first glance, this ordinary application of Palmerton's intrastate access tariffs could also have taken place with respect to the intrastate interexchange call traffic that is transported by GNAPs — VoIP or IP-enabled calls included — and indirectly terminated at Palmerton's PSTN facilities. Palmerton's special traffic study, the statistical validity of which is further discussed below, has indicated that GNAPs indirectly transports and terminates at Palmerton's PSTN facilities calls of various categories and originating protocols including ILEC, CLEC, cable company (i.e., fixed interconnected VoIP or IP-enabled), wireless, and nomadic VoIP. Palmerton Exc. at 31, *see also* Palmerton Exh. 6. And GNAPs acknowledges that it accepts traffic in a variety of communication protocols, including IP, ATM and the more conventional TDM. Tr. 849-850.

GNAPs argued and the Initial Decision found — largely on the basis of the FCC's *Vonage* decision — "that the majority of its [GNAPs'] traffic is received from three other carriers, Transcom, CommPartners and PointOne; that the vast majority of its traffic is enhanced and hence, information services rather

---

[20] The evidentiary record indicates that at least four more companies, other than GNAPs, have refused to pay terminating access charges to Palmerton and other ILECs, with at least one more intercarrier compensation dispute between one or more ILECs and one of those four companies currently pending before the Commission. Tr. 532. Some of Service Electric's services operate on the basis of the session initiated protocol or SIP, an advanced form of IP. Tr. 632.

than telecommunications services, and that a very significant amount (at least half) of its traffic is nomadic VoIP." ID at 33-34; GNAPs Reply Exc. at 2. On the basis that GNAPs handles "enhanced" or "information services" and nomadic VoIP traffic, GNAPs alleges — again largely on the basis of the FCC's *Vonage* decision — that such traffic is exempt from the application of intrastate access charges because such traffic is "jurisdictionally interstate." GNAPs MB at 8-9 (citing FCC *Vonage* decision and the initial *Vonage v. NE PSC* federal court decision).

This GNAPs argument and the associated findings in the ID are not persuasive. The NH PUC was faced with a similar GNAPs argument and rejected it for the simple reason that GNAPs had not paid any carrier access charges to the TDS ILECs in New Hampshire *"whether intrastate or interstate"* for the indirect termination of GNAPs transported traffic. NH PUC Order at 23 (emphasis added). The situation is not different in the case before us. The preceding discussion has established and GNAPs acknowledges that it is not an "enhanced service" or "information service provider" (ISP), and that it does not itself engage in any alleged "enhancement" of the traffic that it transports. Tr. 876-877. The evidentiary record is clear that GNAPs has not paid *any* access charges to Palmerton, whether interstate or intrastate, and that Palmerton's monetary claim is concentrated on the intrastate portion of the intercarrier compensation dispute at issue that is clearly within this Commission's jurisdiction. Tr. 284, 287.

The fact that GNAPs transports and indirectly terminates traffic that may have initially originated in IP, inclusive of nomadic VoIP, is largely immaterial to this analysis on whether this Commission has subject matter jurisdiction and whether the appropriate jurisdictional intercarrier compensation should apply for this common carriage function. GNAPs is unable to explain the presence of more conventional intrastate interexchange ILEC, CLEC, and wireless

calls in the stream of traffic that it transports and indirectly terminates at Palmerton's PSTN facilities — where such calls have been detected in Palmerton's special traffic study — and GNAPs' own testimony does not totally exclude their presence. Tr. 925-928.

In a similar fashion, GNAPs propounds the argument that the traffic it transports does not leave its local calling area "as its service never touches the local calling area," and that as an "intermediary carrier" carrying IP-enabled transit traffic it should be subjected at most to cost-based reciprocal compensation rates under Section 251 of TA-96, 47 U.S.C. § 251, for terminating such traffic at Palmerton's facilities.[21] GNAPs MB at 21-22. This argument lacks substantive and legal merit and is merely designed to advocate the solution that GNAPs achieved through the NY PSC *TVC v. GNAPs* decision directing TVC Albany and GNAPs to "work out a traffic exchange agreement establishing rates, charges, terms and conditions for nomadic VoIP traffic." NY PSC *TVC v. GNAPs* decision at 17. GNAPs also points out the lower reciprocal compensation rate that exists in Commission approved interconnection agreements between Verizon PA and

[21] The clear inference here is that the GNAPs intercarrier compensation with Palmerton for IP-enabled traffic should be based on the total element long-range incremental cost (TELRIC) standard that this Commission has utilized for deriving reciprocal compensation rates for the exchange of local exchange traffic between interconnected ILECs such as Verizon PA and CLECs. The same TELRIC-based rates are also generally applicable in the intercarrier compensation arrangements between local wireline telecommunications carriers, e.g., ILECs, and wireless carriers for the exchange of intra-MTA (within the major trading area) traffic in accordance with applicable FCC rules. In terms of numerical values, reciprocal compensation rates are lower than intrastate and interstate carrier access rates.

various CLECs for the exchange of VoIP traffic. Tr. 692, 700-704, and Verizon PA Exh. 1.[22]

This argument must fail for multiple reasons. First, GNAPs' traffic termination at Palmerton's facilities is indirect under Section 251(a)(1) of TA-96, 47 U.S.C. § 251(a)(1), and Palmerton was clearly obliged to terminate the traffic and did so until on or about May 19, 2009 when GNAPs ceased sending traffic to Palmerton. Tr. 514, 904.

Second, GNAPs does not have a local calling area presence in Palmerton's service area, nor does it have a direct interconnection agreement.

Third, assuming *arguendo* that GNAPs would seek interconnection with Palmerton and cost-based TELRIC rates for the indirect termination of its IP-enabled traffic at Palmerton's facilities — and nothing of this sort has happened here — it would have to initiate the appropriate interconnection request and

---

[22] The relevant reciprocal compensation rate mentioned in the record for the exchange of VoIP traffic was $0.00045 per minute. It should be pointed out that various *voluntary* interconnection agreement arrangements have been approved by the Commission that address the exchange of VoIP traffic. *See generally Joint Petition of Verizon Pennsylvania Inc. and XO Communications Services, Inc. for Approval of Amendment No. 8 to an Interconnection Agreement Under Section 252(e) of the Telecommunications Act of 1996*, Docket No. A-2009-2085611, Order entered March 27, 2009 (use of interstate and intrastate terminating switched access rates under certain conditions for "Interexchange VOIP Traffic"); *Joint Petition of Windstream Pennsylvania, LLC and Service Electric Telephone Company, LLC for Approval of an Interconnection Agreement Under Section 252(e) of the Telecommunications Act of 1996*, Docket No. A-2009-2145812, Order to be adopted concurrently on February 11, 2010 ("all traffic, other than Local Traffic, that is terminated on the public switched network, regardless of the technology used to originate or transport such traffic, including but not limited to Voice Over Internet Protocol (VOIP) will be assessed either interstate or intrastate (depending on the end points of the call) terminating charges at the rates provided in the terminating Party's access tariff").

Palmerton, as a rural ILEC, could invoke the relevant provisions of Section 251(f) of TA-96, 47 U.S.C. 251(f).

Finally, following the receipt of Palmerton's billing invoices, GNAPs could have approached Palmerton in order to initiate good faith negotiations for a traffic exchange agreement encompassing the subject of IP-enabled traffic. This has not happened.

In summary, we are faced with the same situation as in New Hampshire where the NH PUC found that GNAPs, despite its assertions to the contrary, was indirectly delivering intrastate interexchange traffic to the PSTN facilities of the New Hampshire TDS ILECs. NH PUC Order at 22-23.

The evidence in this proceeding fails to establish that the nomadic VoIP traffic that GNAPs receives from other entities is somehow already or becomes "'enhanced' (significantly changed in form and/or contents)." GNAPs R Exc. at 5-6. The Initial Decision provides the following federal definitions for "enhanced" and "information" services:

> The term "enhanced service" means:
>
> [S]ervices, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. 47 C.F.R. § 64.702(a) [*sic*].
>
> Information service. — The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available

> information via telecommunications, and includes electronic publishing, *but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.* 47 U.S.C. § 153(20).

ID at 23 and n. 11 (emphasis added).

GNAPs argues that Transcom's removal of background noise, the insertion of white noise, the insertion of computer developed substitutes for missing content, and the added capacity for the use of short codes to retrieve data during a call all constitute "enhancements" to the traffic that Transcom passes on to GNAPs. GNAPs MB at 18-19, Tr. 960-962. Palmerton responds that the removal of background noise, the insertion of white noise, and the reinsertion of missing digital packets of an IP-enabled call in their correct location when all the packets of the call become assembled are essentially ordinary "call conditioning" functionalities that are "adjunct to the telecommunications provided by Transcom, not enhancements," and that similar call conditioning has been practiced for a very long time even in the more traditional circuit-switched voice telephony. *See generally* Palmerton Exc. 35-38, Tr. 1046-1047, ID at 24. The FCC has ruled that:

> Adjunct-to-basic services are services that are "incidental" to an underlying telecommunications service and do not "alter [] their fundamental character" even if they may meet the literal definition of an information service or enhanced service.... We find that the advertising message provided to the calling party in this case is incidental to the underlying [AT&T calling card] service offered to the cardholder and does not in any way alter the fundamental character of that telecommunications service. From the customer's perspective, the advertising message is merely a necessary precondition to placing a telephone call and therefore the service should be classified as a telecommunications service.

*In re AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services et al.*, WC Docket Nos. 03-133 and 05-68 (FCC Rel. February 23, 2005), Order and Notice of Proposed Rulemaking, FCC 05-41, *slip op.* ¶ 16 at 6 (citations omitted) (FCC AT&T Prepaid Calling Card Order rejecting AT&T declaratory ruling petition that access charges do not apply to "enhanced" calling card service with advertising message to the end-user consumer).

In the case involving AT&T's use of IP "in the middle" and its request that "its 'phone-to-phone Internet protocol (IP) telephony services are exempt from the access charges applicable to circuit-switched interexchange calls," the FCC stated the following in denying AT&T's request:

> More specifically, AT&T does not offer these customers a "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information;" therefore, its service is not an information service under section 153(20) of the Act. End-user customers do not order a different service, pay different rates, or place and receive calls any differently than they do through AT&T's traditional circuit-switched long distance service; the decision to use its Internet backbone to route certain calls is made internally by AT&T. To the extent that protocol conversions associated with AT&T's specific service take place within its network, they appear to be "internetworking" conversions which the Commission has found to be telecommunications services. We clarify, therefore, that AT&T's specific service constitutes a telecommunications service.

*In re Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361 (FCC Rel. April 21, 2004), Order, FCC 04-97, *slip op.* ¶¶ 1 and 12, at 1, 9 (citations omitted) (FCC AT&T IP in the Middle Order).

In view of the evidence presented and the FCC's rulings in the two AT&T cases referenced above, we find that Transcom does not supply GNAPs with "enhanced" traffic under applicable federal rules. Consequently, such traffic cannot be exempted from the application of appropriate jurisdictional carrier access charges. Also, the Commission is not persuaded by the decision of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, finding Transcom to be an "enhanced services provider" on the basis that Transcom indicated in that proceeding that it provided "data communications services over *private* IP networks (VoIP)." *In re Transcom Enhanced Services, LLC*, No. 05-31929-HDH-11 (Bkrptcy. N.D.Tex., April 28, 2005) at 2 (emphasis added).

**B. Determination of Intercarrier Compensation**

Under currently established practices and available technologies dealing with the rating and billing of interexchange calls, Palmerton largely relies on the originating number of the call and other billing and data base information (e.g., rate centers, Telcordia terminal point master data base, local exchange routing guide or LERG, billing information received from the Verizon PA tandem switch, Signaling System 7 or SS7) to determine whether the call is intrastate or interstate. Tr. 512-513, 739. The following exchange during the evidentiary hearing of July 9, 2009, provides the process that Palmerton uses to jurisdictionally classify and bill calls:

> ALJ WEISMANDEL: Yes, okay. And can you tell me then, with respect to the calls that are described on Palmerton's Exhibit 6 (Revised), what is your position as to where those calls, quote, entered a customer network?
>
> WITNESS LAGER (Palmerton): They entered the customer network at the point indicated by the originating telephone number,

as the tariff [PA P.U.C. Tariff No. 11, Original Page 2-21, General Regulations] states.

ALJ WESMANDEL: Would that be the Verizon tandem in Philadelphia?

WITNESS LAGER (Palmerton): That would be the end office switch where that number resides. On the originating end, if that telephone number is indicated as having been residing in Pennsylvania, the telephone number, the NPA/NXX telephone number, are listed as being a Pennsylvania location, and it's on a telephone switch that's located in that same place, then it is considered as originating in Pennsylvania.

ALJ WEISMANDEL: All right. And you're saying that that's where the call entered the customer network?

WITNESS LAGER (Palmerton): Yes.

ALJ WEISMANDEL: Now let's go back to my hypothetical resident of the suburbs of Denver, Colorado [with a Vonage 717 area code number, Lancaster County, Pa.]. Where did that call enter the network?

WITNESS LAGER (Palmerton): If it has a telephone number assigned to a switch in Pennsylvania, then it entered where the telephone number is assigned.

ALJ WEISMANDEL: So it's your position, Palmerton's position, that regardless of the physical location of the person initiating the call, it's merely a matter of the physical location of the switch?

WITNESS LAGER (Palmerton): That's correct.

Tr. 563-564. *See also* Tr. 569, Palmerton Exc. at 30.

Palmerton's witness further testified that, when the indicator information on a terminated interexchange call is ambiguous or incomplete in its carrier access billing system (CABS), or the call has incomplete originating NPA/NXX telephone number information, the call is defaulted to a lower

interstate carrier access rate rather than the highest intrastate one. Tr. 549. Although Palmerton follows standard industry practices for the jurisdictional classification, access rating, and billing of interexchange calls, it cannot identify the actual physical location of the calling party. For example, if a caller using a wireless phone with an assigned "610" area code number (Southeastern Pennsylvania) calls a Palmerton end-user customer from Manhattan, City of New York, NY, Palmerton will identify and rate this interexchange wireless call as if it originated somewhere in Southeastern Pennsylvania. Tr. 570-571.[23]

The existing state of carrier access billing system technologies and industry practices do not yet permit such a precise location identification of a calling party; neither was Palmerton aware of any network signaling system that would permit such a precise identification. Tr. 579. Furthermore, the evidentiary record indicates that since VoIP or IP-enabled calls are transformed into the TDM protocol prior to their final termination in Palmerton's PSTN facilities (Verizon PA's tandem switch on Market St., Philadelphia, Pa., will forward the traffic to Palmerton in TDM protocol), Palmerton cannot technologically determine whether such calls originated in IP format in the first place. Tr. 382, 849-850, GNAPs Exh. 6 (routing of Vonage nomadic VoIP traffic). Palmerton also testified that it relies on billing records that are generated at and received from the Verizon PA Market Street, Philadelphia, Pa., tandem switch, and that GNAPs "has not sent traffic to Palmerton with information identifying underlying carriers, so, as some other carriers do." Tr. 267.

Palmerton's use of the billing information generated and received from Verizon PA's tandem switch for the jurisdictional classification and rating of calls that terminate at Palmerton's facilities, and the relative reliability and

---

[23] The reference to the "610" area code may have conveyed the erroneous impression that this NPA was assigned to the City of Philadelphia, Pa.

precision of such information or associated lack thereof (treatment of calls with missing billing information), was independently corroborated through the testimony of Verizon PA. The Verizon PA testimony established that its tandem switch identifies the traffic that it receives from GNAPs which is then passed on and terminated in Palmerton's PSTN facilities. However, the Verizon PA tandem switch does not identify whether particular GNAPs calls that eventually terminate at Palmerton's network have originally been IP-enabled. *See generally* Tr. 667-681, 685-691.

In short, Palmerton finds itself in the same situation as the TDS ILECs in New Hampshire where all interexchange IP-enabled originating traffic that came from GNAPs and terminated at their PSTN facilities appeared to be traditional voice traffic that was subject to the appropriate jurisdictional carrier access charges in accordance with their applicable intrastate and interstate carrier access tariffs. NH PUC Order at 21-22.

GNAPs focuses on the various movements of nomadic VoIP calls prior to their eventual termination at Palmerton's facilities for the proposition that all such calls should be classified as interstate and, thus, potentially accrue lower interstate access charges. Palmerton MB at 23-24. This argument must fail for the following reasons. First, as it has been stated before, GNAPs has *not paid any* access charges either interstate or intrastate. Second, here we are not dealing with individual end-user retail calls to ISPs. Instead, we are dealing with the wholesale telecommunications transport movement and termination of interexchange traffic that includes VoIP or IP-enabled calls. In these circumstances, the FCC has opined as follows:

> We agree with Bell South that AT&T's service is not analogous to ISP-bound traffic. Although a call to an ISP may include multiple

> communications, the only relevant communication in the case presented by AT&T is from the calling card caller to the called party. Moreover, even if there are multiple communications, the Commission [FCC] has found that neither the path of the communication nor the location of any intermediate switching point is relevant to the jurisdictional analysis.

FCC AT&T Prepaid Calling Card Order, ¶ 26 at 10.

We find that prior management or movement of a call communication is not dispositive of its jurisdictional classification when, as here, the NPA/NXX origin and termination of the call are clearly intrastate on the basis of available billing information, associated technologies, and established industry practices for the purposes of establishing the appropriate level of intercarrier compensation. In the present factual situation, and in accordance with the evidentiary record, we cannot classify a call – even an interconnected nomadic VoIP call – as interstate simply because it may have moved across the Commonwealth's boundaries while the relevant call origination and termination information clearly indicates an intrastate interexchange classification. We note that even conventional circuit-switched non-VoIP interexchange calls that originate in Pennsylvania are often transported out-of-state before their subsequent in-state termination within the Commonwealth. However, such intermediate transport does not transform the jurisdictional classification of such calls to "interstate." Furthermore, the accompanying SS7 signaling for such calls can and does cross state boundaries (depending on the physical location of the utilized SS7 nodes) in order to independently establish the most optimal path for the transmission and termination of these circuit-switched interexchange calls.

Although the FCC has not yet formally proceeded with any jurisdictional classification of interconnected VoIP calls, it still expects state utility regulatory commissions to deal with and resolve intercarrier compensation

disputes that may implicate interconnected VoIP. *See generally, In re Petition of UTEX Communications Corporation, Pursuant to Section 252(e)(5) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas*, WC Docket No. 09-134 (FCC Rel. October 9, 2009), Memorandum Opinion and Order, DA 09-2205. Finally, the FCC fully expects state utility regulatory commissions to address intercarrier compensation issues that involve intrastate traffic and access matters. *See generally, North County Communications Corp. v. MetroPCS California, LLC*, File No. EB-06-MD-007 (FCC March 30, 2009), Memorandum Opinion and Order, DA 09-719.

Based on the case-specific evidentiary record, we find that Palmerton adequately relied on the NPA/NXX origination and termination of the intrastate interexchange call traffic at issue for the jurisdictional classification and billing of such traffic. Such reliance is consistent with the *Core Appeal Decision* in some other but still rather important respects. *Core Appeal Decision*, 941 A.2d 758 and n.10 (classification of NXX codes and local calling areas).

Although the special traffic study that was carried out by Palmerton may lack the appropriate degree of statistical validity to be fully representative of terminating traffic patterns at Palmerton's facilities for the full time horizon of the intercarrier compensation dispute, that traffic study should not significantly and materially affect the outcome of this proceeding with respect to the compensation amount at issue. Palmerton Revised Exh. 6 (Revised Traffic Study), ID at 31, Tr. 1035-1044. As Palmerton explained in its Exceptions:

> The study was not presented to undertake complicated statistical studies or to derive traffic billing factors. It was designed simply to determine whether the traffic delivered was exclusively nomadic VoIP, as Global NAPs claimed. Exhibit 6 focuses exclusively on

> long distance voice calls that originated from other Pennsylvania numbers. Both Palmerton and Global NAPs used the traffic study as a base document to undertake extensive discovery (interrogatories and depositions) and present witnesses.

Palmerton Exc. at 14 (citations omitted).

Palmerton's special study provided specific information on the various types of entities (e.g., ILEC, CLEC, wireless telecommunications carriers, and cable companies) that had their intrastate interexchange calls transported by GNAPs and indirectly terminated at Palmerton's PSTN facilities. Consequently, this special traffic study is of adequate probative value to draw the appropriate inferences regarding the indirect termination of traffic by GNAPs at Palmerton's facilities and the intercarrier compensation regime that should apply.

Palmerton's special traffic study was utilized in an attempt to reconcile Palmerton's billing of interexchange intra-MTA wireless calls consistent with the directives of our May 5, 2009 Order in this proceeding.[24] It appears from the record that Palmerton made an effort to reduce the overall intercarrier compensation amount in dispute in order to account for the reciprocal compensation rate that is commonly applied for the termination of interexchange intra-MTA wireless calls. Tr. 280. This rate is usually lower than intrastate and interstate carrier access charges in accordance with applicable federal law and past Commission decisions.[25] Although Palmerton's special traffic study played a role in producing the relevant monetary adjustment, this adjustment does not materially

---

[24] Docket No. C-2009-2093336, (Order entered May 5, 2009) at 9.

[25] *See generally, Petition of Cellco Partnership d/b/a Verizon Wireless, et al.*, Docket No. P-00021995 *et al.*, (Order entered January 18, 2005); *ALLTEL Pennsylvania, Inc. v. Verizon Pennsylvania Inc., et al.*, Docket No. C-20039321, (Order entered January 18, 2005).

impact the intrastate intercarrier compensation amount that is at issue. Palmerton Revised Exh. 3.

### C. Intercarrier Compensation and Regulatory Policy

Now that the legal and technical reasons for exercising subject matter jurisdiction in this intercarrier compensation dispute have been discussed and the fundamental merits of the Palmerton Complaint have been sustained, broader regulatory policy issues must also be covered. In our May 5, 2009 Order, we noted that, if "certain competing telecommunications carriers pay intercarrier compensation for VoIP traffic termination, while others take the position that they may avoid such payments for the termination of similar traffic, there can be an anticompetitive environment that artificially and inimically transmits inaccurate price signals to end-user consumers of telecommunications and communications services." Docket No. C-2009-2093336, Order entered May 5, 2009, at 8-9. One of the statutory policy directives in Chapter 30 of the Public Utility Code mandates this Commission to:

> Promote and encourage the provision of competitive services by a variety of service providers *on equal terms* throughout all geographic areas of this Commonwealth without jeopardizing the provision of universal telecommunications service at affordable rates.

66 Pa. C.S. § 3011(8) (emphasis added).

It is obvious that a telecommunications carrier that needs and obtains Palmerton's intrastate carrier access services at the prescribed jurisdictional rates that the carrier then pays to Palmerton will be competitively but artificially

disadvantaged if another carrier obtains the same Palmerton carrier access services and pays no intercarrier compensation.

The FCC has expressed similar concerns:

> The Commission [FCC] is sensitive to the concern that *disparate treatment* of voice services that both use IP technology and interconnect with the PSTN could have *competitive implications*. We note that all telecommunications services are subject to our existing rules regarding intercarrier compensation. Consequently, when a provider of IP-enabled voice services contracts with an interexchange carrier to deliver interexchange calls that begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN, the interexchange carrier is obligated to pay terminating access charges. Our analysis in this order applies to services that meet these criteria regardless of whether only one interexchange carrier uses IP transport or instead multiple service providers are involved in providing IP transport. Thus our ruling here should not place AT&T at a competitive disadvantage. We are adopting this order to clarify the application of access charges to these specific services to remedy the current situation in which some carriers *may be paying access charges for these services while others are not.*

FCC AT&T IP in the Middle Order, ¶ 19 at 13-14 (emphasis added, citations omitted).

In view of the specific facts that have been presented, GNAPs' non-payment of intrastate carrier access charges to Palmerton cannot be condoned as a matter of law and as a matter of sound regulatory policy. This conclusion is based on existing Pennsylvania and federal law and this Commission's subject matter jurisdiction to resolve intercarrier compensation disputes.

## D. The Exceptions

We note that any issue or Exception, which we do not specifically address herein, has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider expressly or at length each contention or argument raised by the Parties. *Wheeling & Lake Erie Railway Co. v. Pa. PUC*, 778 A.2d 785, 794 (Pa. Cmwlth. 2001), *also see, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

In addition to the foregoing, Section 332(a) of the Code, 66 Pa. C.S. § 332(a), provides that the party seeking a rule or order from the Commission has the burden of proof in that proceeding. It is axiomatic that "[a] litigant's burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible." *Samuel J. Lansberry, Inc. v. Pa. PUC*, 134 Pa.Cmwlth. 218; 221-222, 578 A.2d 600; 602 (1990), app. denied, 529 Pa. 654, 602 A.2d 863 (1992). The term "preponderance of the evidence" means that one party has presented evidence that is more convincing, by even the smallest amount, than the evidence presented by the other party. *Se-ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

While the burden of persuasion may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001).

### 1. Palmerton's Exceptions

Palmerton filed both Exceptions and Reply Exceptions in this case. We will address those Exceptions and Replies, below.

Palmerton made the following Exceptions to the ID:

**Exception No. 1 - The ID misapplied the burden of proof, improperly dismissed the probative value of the Palmerton Traffic Study and erred by relying on hearsay evidence and speculation to determine the nature of Global NAPs traffic.**

The essence of this Exception is found in Footnote 35 of Palmerton's Exceptions:

> Clearly, Global NAPs is asserting the affirmative defenses of nomadic VoIP origination and "enhancement" and the burden is on it [Global NAPs] to present legally sufficient evidence to prove such defenses.

Palmerton Exc. at 13, n. 35.

Palmerton brought a Formal Complaint, as a result of a billing dispute, against Global NAPs. Under the Code at Section 332(a), 66 Pa. C.S. § 332(a), the proponent of a rule or order has the burden of proof. The ALJ concluded, and we agree, that Palmerton, as the proponent of a Commission Order, has the burden of proof in this case. ID at 42; Conclusion of Law No. 4. We agree with the ALJ that to prevail, Palmerton must show that Global NAPs is responsible or accountable for the problem described in the Complaint. ID at 42; Conclusion of Law No. 5; *Patterson v. Bell Telephone Company of Pennsylvania*, 72 Pa. PUC 196 (1990), *Feinstein v. Philadelphia Suburban Water Company*,

50 Pa. PUC 300 (1976). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Public Utility Comm'n, supra.* Further, while the burden of going forward with evidence may shift back and forth between the parties, the ultimate burden of persuasion remains with Palmerton. *Milkie v. Pa. Public Utility Comm'n*, 768 A.2d 1217 (Pa.Cmwlth. 2001). ID at 20.

Global NAPs raised affirmative defenses in this case. While a Party raising affirmative defenses bears the burden of proof as to that affirmative defense, this does not relieve the Complainant of meeting its burden. ID at 43, Conclusion of Law No. 15.

The core of Palmerton's case is Palmerton Exhibit 6 and Exhibit 6 [Revised], referred to as "the Palmerton Traffic Study," along with supporting testimony. This is a "study" by Palmerton of approximately 2,100 allegedly "intrastate" calls received by Palmerton during one month from Global NAPs. The ALJ concluded that Palmerton failed to meet its burden because "the Palmerton Traffic Study" does not have any statistical validity. The number of calls included in Palmerton's one-month "study" amounts to only slightly more than one per cent of the 189,000 supposed "intrastate" calls received by Palmerton from Global NAPs, and the "study" did not differentiate between "telecommunications services" and "information services." ID at 16, 30, 47-48; Findings of Fact 30-38, Conclusions of Law Nos. 54-60.

We disagree with the analysis in the Initial Decision to the extent that the ALJ would require Palmerton to present an exhaustive study in order to meet its burden. The issues in this case, as demonstrated by the extensive discussion in the Initial Decision and this Opinion and Order, center on jurisdiction and Palmerton's right to compensation rather than the statistical validity of the Palmerton Traffic Study. We find that the Palmerton Traffic Study

was sufficient to allow a finding that Palmerton established the essential nature of the call traffic transported by GNAPs and terminated at the facilities of Palmerton, and therein lies its probative value.

After consideration of the record in this proceeding, Palmerton's Exception is granted, in part.

**Exception No. 2 - The ID erred in concluding that IP-initiated traffic is exempt from state access charges.**

In this Exception, Palmerton argues that the ALJ erred in his jurisdictional analysis. Palmerton contends that the absence of a definitive jurisdictional ruling on state intercarrier compensation allows a state public utility commission to decide this issue (Palmerton's failure to meet its burden of proof notwithstanding). Palmerton points to the decision of the FCC in *Vonage*, for the proposition that because the FCC was silent on compensation issues, state commissions are not precluded from ruling on issues of state intercarrier compensation. Palmerton Exc. at 22-23.

In its Reply Exceptions, Global NAPs counters Palmerton's contention, stating:

> While the FCC has not yet specified the compensation rates for terminating VoIP traffic, it has clearly and repeatedly stated both its intention to do so and its preemption of state traffic regulation of all VoIP and enhanced traffic so that piecemeal regulation of this issue at the state level is prevented.

Global NAPs Reply Exc. at 14.

For the reasons discussed in the earlier part of this Opinion and Order, we conclude that Global NAPs' analysis of the *Vonage* case as potentially limiting the jurisdiction of state commissions is overreaching and an unacceptable limitation on the jurisdiction of this Commission.

Palmerton's Exception is, therefore, granted.

**Exception No. 3 - The ID erred in concluding that upstream carriers from whom Global NAPs receives traffic exempted the traffic from access charges by "enhancing" it.**

Palmerton's Exception is derived, in large part, from its previous Exception No. 1 that the ALJ relied on hearsay evidence in arriving at his finding that the traffic Global NAPs sends to Palmerton is "enhanced." Palmerton Exc. at 32; ID at 17; Findings of Fact Nos. 48-49. Global NAPs replies that the ALJ correctly determined that the traffic at issue has been "enhanced" by Global's customers and is, therefore, an "information service" not subject to intrastate access charges. Global NAPs' Reply Exc. at 18.

For the reasons discussed in the earlier part of this Opinion and Order, we disagree with the analysis presented in the Initial Decision, and Palmerton's Exception is granted.

**Exception No. 4 - The ID erred in dismissing Complaint Counts I, II, III, IV and V.**

This Exception is, essentially, a "prayer for relief," in that we are asked to conclude that the ALJ's Findings of Fact and Conclusions of Law are in error and should be reversed. It does appear that Palmerton is asking us to adopt

the findings and conclusions that Palmerton advocated in its Main Brief. To that end, Palmerton attached to its Exceptions 175 proposed Findings of Fact and 75 proposed Conclusions of Law.[26] Palmerton Exc., Appendix A. Many of those proposed Findings of Fact and Conclusions of Law sound in the nature of argument. We agree with the ALJ that the inclusion of additional proposed Findings of Fact and of proposed Conclusions of Law in Reply Briefs is procedurally improper and will not be considered in this Opinion and Order. See, 52 Pa. Code § 5.533; ID at 11.

Palmerton's Exception is denied.

**2. Global NAPs' Exception**

Global NAPs filed a single Exception to the ID:

**The Commission should reexamine its imposition of a civil fine upon Global in light of the ALJ's ID and the Commission's Policy Statement on Penalties.**

We note that this request by Global NAPs was not addressed in the Initial Decision, which is silent on this issue save to order the payment of the civil penalty imposed by the Initial Decision Imposing Sanctions issued June 5, 2009. Through its Exception, Global NAPs effectively requests that we rescind or amend our prior Opinion and Order of June 25, 2009, in which we affirmed the ALJ's

---

[26] We note that a number of Palmerton's proposed Findings of Fact and Conclusions of Law were designated "Proprietary or Highly Confidential" by Palmerton. These materials were not made the subject of a Petition for Protective Order as required by our procedural regulations at 52 Pa. Code § 5.423. *Orders to limit availability of proprietary information.* We will, however, accord these materials confidential treatment in accord with 52 Pa. Code § 5.423 though it should be noted that we do not find them persuasive in this case.

Initial Decision Imposing Sanctions. In order to resolve this matter, we will invoke our authority at 52 Pa. Code § 1.2(a), *Liberal construction*, which states:

> This subpart shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which it is applicable. The Commission or presiding officer at any stage of an action or proceeding may disregard an error or defect of procedure which does not affect the substantive rights of the parties.

We will also consider the request as within our authority to grant or deny under Section 703(g) of the Code, 66 Pa. C.S. § 703(g), relative to rescission and amendment of orders.

Global NAPs makes the argument that the civil penalty imposed in this case by the ALJ due to Global NAPs' failure to obtain a surety bond in favor of Palmerton should either be removed completely or reduced. Palmerton had ample opportunity, which it availed itself of in Reply Exceptions, to advance arguments to the contrary.[27]

In support of this request that the civil penalty be entirely eliminated, Global NAPs argues several points. First, Global NAPs contends that no basis exists for continuing emergency relief to Palmerton given the ALJ's Initial Decision. Global NAPs' Exception at 7-8. Second, Global NAPs argues that the Initial Decision is consistent with and should be considered in the context of the case of *Complaint of TVC Albany, Inc. d/b/a Tech Valley Communications Against Global NAPs, Inc. for failure to Pay Intrastate Access Charges*, NY PSC Case No. 07-C-0059 (Order dated March 20, 2008) (*TVC*). Global NAPs' Exc. at 8-9.

---

[27] We also note that Palmerton did not file a Motion to Strike Global NAPs' Exception as beyond the scope of 52 Pa. Code § 5.533.

Finally, Global NAPs repeats its core argument that its traffic is interstate in nature and so is not subject to Commission jurisdiction. Global NAPs' Exc. at 9-10. In this respect, Global NAPs argues that the fact that the Commission has no jurisdiction over the payment of the access charges at issue in this case provides a reason for the Commission to terminate the bond requirement and to remove or sharply reduce the civil penalty for Global NAPs' failure to file the bond. Global NAPs' Exc. at 10.

Palmerton filed Reply Exceptions in which it vigorously disagrees with Global NAPs' request to rescind or to modify the civil penalty imposed by the ALJ. In its Reply Exceptions, Palmerton alleges acts of bad faith, misfeasance and malfeasance on the part of Global NAPs in at least a dozen other jurisdictions. Palmerton Reply Exc. at 1-7. Palmerton also points out that Global NAPs "ignored the Commission's [June 25, 2009] Order and those entered by the ALJ requiring financial security." Palmerton Reply Exc. at 8. Palmerton questions Global NAPs' interpretation of the *TVC* case and challenges its applicability in this case. Palmerton Reply Exc. at 10-12.

In resolving this issue, we will deal with the facts before us within the scope of our jurisdiction and the law.

We do agree with Palmerton that a contempt sanction is not dependent upon whether a Party ultimately wins a case. Palmerton RExc. at 9. Global NAPs failed to comply with the ALJ's Decision Imposing Sanctions and with our Opinion and Order of June 25, 2009 affirming the same. Global NAPs does not dispute this. However, Global NAPs did offer to post the bond in installments. ID at 38-39.

We also agree with Global NAPs that given the Findings of Fact and Conclusions of Law in the Initial Decision, it is not appropriate, at this time, to impose a civil penalty of the scope originally contemplated by the ALJ in the Initial Decision Imposing Sanctions and as affirmed in our Opinion and Order of June 25, 2009. That civil penalty would now be approximately $230,000, which would be at least $25,000 more than the amount of the bond originally required by the ALJ in this case. We could, of course, impose that penalty on Global NAPs, Inc., and its affiliates. However, the outcome of imposing such a penalty is problematic, at best, given that the only Global NAPs entity over which our Commission has undisputed jurisdiction, Global NAPs South, Inc., has no income or revenue. *See*, Initial Decision Imposing Sanctions at 6; Finding of Fact No. 13.

In its Exception, Global NAPs suggests that, in arriving at an appropriate civil penalty in this matter, we apply the provisions of 52 Pa. Code § 69.1201, *Factors and standards for evaluating litigated and settled proceedings involving violations of the Public Utility Code and Commission regulations—statement of policy*. Given the specific facts of this proceeding, we agree, though we wish to be clear that this action is not a precedent for parties to ignore sanctions.

The factors to be considered under 52 Pa. Code § 69.1201(c) are as follows:

> (1) Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.

(2) Whether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.

(3) Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated cases. When conduct has been deemed intentional, the conduct may result in a higher penalty.

(4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.

(5) The number of customers affected and the duration of the violation.

(6) The compliance history of the regulated entity which committed the violation. An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.

(7) Whether the regulated entity cooperated with the Commission's investigation. Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty.

(8) The amount of the civil penalty or fine necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount.

(9) Past Commission decisions in similar situations.

(10) Other relevant factors.

Global NAPs argues that although its conduct in this case in refusing to pay billed access charges was of a serious nature, its position was taken in good faith, and Global NAPs did offer to meet the bond requirement in installments. Global NAPs' Exc. at 13. The consequences of Global NAPs' failure to post the bond were potentially very serious. Global NAPs' conduct was intentional, as Global NAPs admits in its Exception; however, Global NAPs reiterates its willingness to have provided the bond over a four month period. Global NAPs Exc. at 14. Global NAPs asserts that factors (4) and (5) of 52 Pa. Code § 69.1201(c) are not relevant in this proceeding, and we agree. Global NAPs admits that its annual reports were not timely filed but argues that it is otherwise compliant with the Code and the Commission's regulations.[28] Global NAPs Exc. at 15. Global NAPs points out that this matter derived from a Formal Complaint, not from a Commission investigation, and to the extent that this factor is relevant it does not appear that Global NAPs acted in "bad faith" in this matter or that it attempted active concealment of violations. With respect to the amount of the civil penalty or fine necessary to deter future violations and past Commission decisions in similar situations, Global NAPs reiterates that no civil penalty should be imposed. Global NAPs Exc. at 16-17. Global NAPs cites two recent cases which, though factually inapposite, are advanced to support Global NAPs'

[28] We note that Global NAPs South, Inc. has not otherwise been the subject of complaints (with the exception of the instant case) nor of Commission investigations. ID at 51, Conclusion of Law No. 87.

contention that the current civil penalty is excessive.[29] Global NAPs Exc. at 17-18.

We find that Global NAPs' failure to comply with the Initial Decision Imposing Sanctions was both intentional and a serious matter. This is conduct that the Commission cannot accept. We do understand, however, that Global NAPs did offer to post the required bond in installments, that Global NAPs' sanctioned conduct was limited to this proceeding and involved no threat to the public health or welfare, and that Global NAPs South, Inc. has not been the subject of other Commission complaints. While failure to obey a lawful Order of the Commission must have consequences, we believe that it is appropriate to impose a civil penalty in this matter of $50,000.

Before concluding, we note that Verizon did not file Exceptions but filed Reply Exceptions in this proceeding. However, these "Reply Exceptions," refer us to Verizon's Reply Brief (attached to the Reply Exceptions) which asks that we confine our decision in this matter to the specific facts of this case and to the parties before us.

Our procedural rules with respect to Exceptions are clear:

> **§ 5.533. Procedure to except to initial, tentative and recommended decisions.**
>
> * * *
>
> (b) Each exception must be numbered and identify the finding of fact or conclusion of law to which exception

---

[29] Those cases are: *Re The Pennsylvania Universal Service Fund Interim Order*, Docket No. P-0098142F1000 (2008) and *Johnson, et al. v. Metropolitan Edison Company,* Docket Nos. C-20077995 and C-2008-2029081 (Order entered May 7, 2009)

> is taken and cite relevant pages of the decision. Supporting reasons for the exceptions shall follow each specific exception.
>
> (c) The exceptions must be concise. The exceptions and supporting reasons must be limited to 40 pages in length. Statements of reasons supporting exceptions must, insofar as practicable, incorporate by reference and citation, relevant portions of the record and passages in previously filed briefs. A separate brief in support of or in reply to exceptions may not be filed with the Secretary under § 1.4 (relating to filing generally).

While we agree with the basic proposition advanced by Verizon, in this case, Verizon's Reply Exceptions are nothing more than a reiteration of Verizon's Reply Brief. This submission does not conform to even the minimal requirements of our procedural regulations and is denied.

## Conclusion

Based upon the foregoing discussion, the Initial Decision of Administrative Law Judge Wayne L. Weismandel is affirmed in part and reversed in part, and the Exceptions of Palmerton Telephone Company are granted in part and denied in part, and the Exception of Global NAPs is granted in part and denied in part, as set forth in this Opinion and Order; **THEREFORE**,

**IT IS ORDERED:**

1. That the Exceptions of Palmerton Telephone Company to the Initial Decision of Administrative Law Judge Wayne L. Weismandel are granted in part and denied in part, consistent with this Opinion and Order.

2. That the Exception of Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and Other affiliates to the Initial Decision of Administrative Law Judge Wayne L. Weismandel is granted in part and denied in part, consistent with this Opinion and Order.

3. That the Initial Decision of Administrative Law Judge Wayne L. Weismandel is affirmed in part and reversed in part, consistent with this Opinion and Order.

4. That the Formal Complaint of Palmerton Telephone Company is sustained, consistent with this Opinion and Order.

5. That within thirty (30) days of entry of the Commission's Order in this proceeding, Palmerton Telephone Company shall issue a final bill to Global NAPs consisting of all amounts owed for intrastate interexchange call traffic transported by Global NAPs and terminated at the facilities of Palmerton Telephone Company.

6. That within thirty (30) days of the bill issuance by Palmerton Telephone Company in accordance with Paragraph No. 5 above, Global NAPs shall make full payment to Palmerton Telephone Company with appropriate notification to this Commission and the participating parties in this proceeding.

7. That if Global NAPs shall not make the payment to Palmerton Telephone Company in accordance with Paragraph No. 6 above, this matter shall be referred to the Law Bureau of the Commission for investigation and further action as deemed necessary.

8. That, consistent with the Initial Decision, Global NAPs South, Inc. shall pay a civil penalty of $750 for three violations of the provisions of 52 Pa. Code § 63.36.

9. That, consistent with the Initial Decision and pursuant to Sections 3301 and 3315 of the Public Utility Code, 66 Pa. C.S. §§ 3301 and 3315, Global NAPs South, Inc. shall pay a civil penalty of $750 for the violations addressed in ordering Paragraph No. 8, above, within thirty (30) days of the date of entry of this Opinion and Order, by certified check or money order to:

Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

10. That the Commission's Opinion and Order of June 25, 2009, adopting the Initial Decision Imposing Sanctions of June 5, 2009, and the Initial Decision in this matter, are modified to impose a civil penalty of $50,000 on Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and Other affiliates for failure to comply with the directive to obtain a surety bond.

11. That, consistent with the Initial Decision and pursuant to Sections 3301 and 3315 of the Public Utility Code, 66 Pa. C.S. §§ 3301 and 3315, Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and

Other affiliates shall pay a civil penalty of $50,000 for the violations addressed in ordering Paragraph No. 10, above, within thirty (30) days of the date of entry of this Opinion and Order, by certified check or money order to:

Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

12. That if Global NAPs shall not make payment of the civil penalties specified in Paragraphs Nos. 9 and 11, above, the matter shall be referred to the Law Bureau of the Commission for investigation and further action as deemed necessary.

13. That upon receipt of the civil penalties in this matter from Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and Other affiliates, that this matter be marked closed.

**BY THE COMMISSION,**

James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: February 11, 2010

ORDER ENTERED: March 16, 2010

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105

**Palmerton Telephone Company**
**v. Global NAPs South, Inc.,**
**Global NAPs Pennsylvania, Inc.,**
**Global NAPs, Inc. and Other Affiliates**

**Public Meeting – February 11, 2010**
**2093336 - OSA**
**Docket No. M-2009-2093336**

## STATEMENT OF VICE CHAIRMAN TYRONE J. CHRISTY

Before us today for consideration are the Exceptions of the Palmerton Telephone Company (Palmerton), and of Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and other affiliates (Global NAPs), to the Initial Decision of Administrative Law Judge Wayne L. Weismandel (ALJ) issued on August 7, 2009. Reply Exceptions were filed in this case by Palmerton, Global NAPs and Verizon Pennsylvania, Inc. (Verizon). This proceeding originated because Palmerton filed a multi-count formal complaint alleging that Global NAPs refused to pay tariffed access charges for the termination of traffic on Palmerton's network. Global NAPs, in its April 2009 Answer, indicated that it did not owe Palmerton any monies for the termination of traffic because of the nature of the type of traffic. The Commission entered an Order in May 2009, from which I dissented, directing Global NAPs to place certain monies allegedly owed to Palmerton in escrow or to obtain a surety bond for the same amount. Subsequently, the parties litigated their dispute before ALJ Weismandel which concluded in August 2009.

As I have stated previously and continue to believe, the dispute before us between these two carriers warranted a fully litigated case to determine subject matter jurisdiction of this Commission as well as whether compensation is owed to Palmerton for termination of Global NAPs' traffic on Palmerton's network. Now, we can roll up our sleeves and wade through the record in this case to actually determine if there is compensation owed, including the proper rate to be applied to the terminating traffic in question.

Based on the current federal and state law that exists on intercarrier compensation, it is prudent for this Commission to assert subject matter jurisdiction in this proceeding between two Pennsylvania certificated carriers -- Palmerton, an incumbent local exchange carrier (ILEC) and Global NAPs, a competitive local exchange carrier (CLEC). To do so is legally sound based upon the facts in this proceeding. I firmly believe that all certificated carriers, absent federal preemption, are responsible for compensating each other when they originate and terminate telecommunications traffic on the various networks that exist in Pennsylvania. In fact, several other carriers operating in Pennsylvania believe that this Commission has subject matter jurisdiction to determine compensation disputes as is

evidenced by the number of complaints that have been filed over the last year by various entities asking for resolution of these issues.[1]

However, whether compensation is owed between carriers for the origination and termination of traffic and what type of rate is to be applied to the specific traffic exchanged is an additional set of issues. Generically, the compensation, if owed, can take several forms including rates applied to certain traffic through interconnection agreements, by existing tariffs or by identifiable NPA-NXX ratings (rather than the location of the caller). In the instant case, there is no existing interconnection agreement between Palmerton and Global NAPs to provide for the terms for compensation for the wireline telecommunications traffic identified and exchanged by the parties in this proceeding. This is very unfortunate. I would have liked the parties to have negotiated and voluntarily agreed to identify the traffic to be delivered on their networks and established an equitable compensation structure for this exchange. This would have benefited both carriers in that this dispute may have been avoided. Also, a voluntary interconnection agreement would have benefited Pennsylvania consumers in general because Global NAPs may have been able to maintain its business plan and further telecommunications competition in the Commonwealth.

Without an interconnection agreement between the parties, this Commission must rely on the record to support the fact that compensation is owed to Palmerton in this specific proceeding. I believe that the record in this case as well as Commission-approved interconnection agreements support the fact that some compensation is owed to Palmerton for the termination of VoIP type traffic in this specific proceeding. Unfortunately, the record is less than perfect in determining whether Palmerton's assessment of the Global NAPs wireline traffic is intrastate telecommunications service warranting intrastate carrier access tariff rates to be applied. I.D. at 30-31. ALJ Weismandel found that Palmerton's traffic study did not truly represent the type or volume of traffic sent by Global NAPs to Palmerton's network for termination during the disputed time period. *Id.*, Tr. 296. Also, the ALJ determined that Global NAPs presented evidence that Palmerton had included information service type traffic in its study entered into the record. I.D. at 31. I believe that it is a fine line as to whether all of the calls included in Palmerton's traffic study constitute intrastate telecommunications service.

In examining this case, I have reviewed current interconnection agreements between ILEC and CLEC carriers operating in Pennsylvania to determine how the type of traffic at dispute in this case is treated for compensation purposes. I have found that numerous carriers have been addressing the treatment of VoIP type traffic in their interconnection agreements. For example, in a related matter today, Windstream Pennsylvania, LLC ( ILEC) and Service Electric Telephone Company, LLC (CLEC) have agreed in their joint interconnection agreement that "all traffic, other than local traffic,

---

[1] Palmerton Telephone Company v. Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and Other Affiliates, Docket No. C-2009-2093336 (Initial Decision issued on August 7, 2009), Core Communications, Inc. v. Choice One Communications of Pennsylvania, Inc. d/b/a One Communications and CTC Communications Corp. d/b/a One Communications, Docket No. C-2009-2130379 and C-2009-2131838 (Complaint filed September 3, 2009), Core Communications, Inc. v. XO Communications, Inc., Docket No. C-2009-2133609 (Complaint filed September 23, 2009), Core Communications, Inc. v. AT&T Pennsylvania, LLC and TCG Pittsburgh, Inc., Docket Nos. C-2009-2108186 and C-2009-2108239 (Complaints filed May 19, 2009).

that is terminated on the public switched network, regardless of the technology used to originate or transport such traffic, including but not limited to Voice Over Internet Protocol (VoIP) will be assessed either interstate or intrastate (depending on the end points of the call) terminating charges at the rates provided in the terminating party's access tariff."[2] There are numerous other interconnection agreements that have been approved by this Commission that has similar or identical language to address the compensation issue of various types of telecommunications traffic, including VoIP, that originate and terminate on Pennsylvania networks. It is obvious that carriers operating in Pennsylvania have come to realize, and I support their view, that compensation is owed for various types of telecommunications traffic and have agreed to rate the calls in a certain manner to receive compensation for specifically identified traffic. These agreements may not be 100% precise so that they fully capture the realities of the termination of traffic on carriers' networks but they are reasonable solutions so that all carriers compensate each other for the use of the current telecommunications networks.

I find that the Commission-approved interconnection agreements are instructive in determining whether compensation is owed and what rate should be applied to the traffic terminated on Palmerton's facilities. However, I continue to be troubled by the record in this proceeding to support the assessment that all of the identified Global NAPs traffic terminated on Palmerton's facilities is subject to intrastate access charges of approximately $190,000 in accordance with Palmerton's tariff. I would rather have the parties be given a further opportunity to determine the appropriate traffic to be compensated at the intrastate access rate so that a more accurate compensation amount is derived for the traffic terminated on Palmerton's facilities in this proceeding.

I further reiterate my belief that each of the proceedings that involve carriers' disputes on traffic origination and termination and the compensation owed for that function are unique to the specific facts set forth before this Commission. I also note that additional clarification on this issue by future Federal Communications Commission actions as well as results of this Commission's own access charge investigation may alter the Commission's dispositions of these disputes. I look forward to continuing to address these issues based upon the records presented in the individual proceedings.

2-11-10
DATE

Tyrone J. Christy
TYRONE J. CHRISTY, VICE CHAIRMAN

[2] Joint Petition of Windstream Pennsylvania, LLC and Service Electric Telephone Company, LLC for Approval of an Interconnection Agreement under Section 252(e) of the Telecommunications Act of 1996, Docket No. A-2009-2145812 (Order adopted February 11, 2009). *See also* Joint Petition of Verizon North Inc. f/k/a GTE North Incorporated and XO Communications Services, Inc. f/k/a XO Pennsylvania, Inc. f/k/a NEXTLINK Pennsylvania, Inc. for Approval of Revised Amendment No.1 of an Interconnection Agreement Under Section 252(e) of the Telecommunications Act of 1996, Docket No. A-2009-2085734 (Order adopted September 10, 2009).

PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17105-3265

**Palmerton Telephone Company v. Global NAPs, Inc., et al.**

**Public Meeting held February 11, 2010**
**2093336-OSA**

**Docket Nos. C-2009-2093336**

## STATEMENT OF COMMISSIONER WAYNE E. GARDNER

I would associate myself with and concur in the conclusion reached in the Motion of the Chairman. I further commend his leadership and the excellent work of his staff.

This case has been characterized as a billing dispute between Palmerton, an ILEC, and Global NAPs, a CLEC. This dispute, however, has important implications for other carriers who may be similarly situated.

Palmerton alleges, among other counts, that Global has refused to pay access charges for calls that originate with Global and are routed to Palmerton's network facilities through a Verizon tandem, for ultimate termination to end-users in Palmerton's service area.
Global maintains that the calls at issue are interstate in nature and not subject to state rate regulation. This position is based on the technical protocols used in the transmission of the calls. Global maintains that the calls are not "telecommunications", but rather are "information" because they use voice over internet protocol, IP based protocol, or are "nomadic."

In the complex world of telecommunications regulation, the distinction between telecommunications and information is essential when determining what intercarrier pricing regime will apply to the traffic.

As the Parties are aware, the FCC has not definitively addressed the intercarrier compensation pricing regime that will apply to this type of dispute. The Parties argue that the array of FCC and court decisions rendered to date, support their respective positions. Also, state commissions that have addressed similar disputes have reached different conclusions.

I am influenced by three considerations in my support for the Chairman's Motion.

First, in an AT&T declaratory order, *In Re Petition for Declaratory Ruling that AT&T's Phone-to-phone IP Telephony Services are Exempt from Access Charges*, 19 F.C.C. rcd. 7457 (rel. April 21, 2004), the FCC has clearly set out three criteria which should exist when access charges may apply. This FCC decision was made in the context of a specific, phone-to-phone service provided by AT&T. The FCC concluded that the service involved may have access charges applied if it: (1) uses ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originates and terminates on the public switched telephone network (PSTN); and (3) undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology.

In talking about the "no net protocol conversion element", the FCC appeared to address the situation which I believe the record in this case shows. The protocol conversion on which Global relies to take the position that the traffic is interstate is, in my opinion, an "internetworking" conversion. This is a conversion that the FCC found to be telecommunications. Using my own words, this is a conversion that is more form than substance. Therefore, a conversion of this type does not, in and of itself, render the traffic "information."

If I may paraphrase a saying, if it has feathers, a bill, webbed feet, quacks and walks like a duck, it is reasonable to assume that it is, in fact a duck – and should be so treated for regulatory purposes.

Second, federal preemption may occur in, at least, three ways.

> #1 the federal occupation of the field is so extensive as to permit no state role on the subject,
>
> #2 the federal agency may expressly preempt state regulation in the area, or
>
> #3 the state regulation may stand as an obstacle to achieving federal goals.

This is an area where I believe our actions do not violate any basis for federal preemption. The FCC stated in the AT&T Declaratory Order that, "the decision we make in this order with regard to AT&T's specific service is meant to provide clarity to the industry with respect to the application of interstate access charges pending the outcome of the rulemaking proceeding." Thus, the FCC acknowledged that interstate access charges are appropriate pending the completion of its rulemaking.

Third, it is noted that several, voluntarily negotiated, interconnection agreements contain provisions which address the type of situation presented in this case. Cable companies, who use a similar, IP-based telephony, routinely pay access charges to LECs such as Palmerton. These observations strongly suggest that parties, using good faith negotiations as contemplated by TA-96, can rely on market forces to resolve the applicable compensation issues for the type of service for which Palmerton seeks compensation. I do not think that compensation for the service and/or facilities of Palmerton under either a federal resolution of this dispute or, in this case, a state decision, will be at zero cost to the CLEC.

Based on the foregoing, I concur in the Chairman's Motion. I strongly believe that if you use the network or facilities of a Pennsylvania jurisdictional utility, you must, in good faith, make the proper arrangements to compensate the company for such use.

**February 11, 2010**
**Date**

**Wayne E. Gardner, Commissioner**